

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-6167

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 77-6167

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P/S

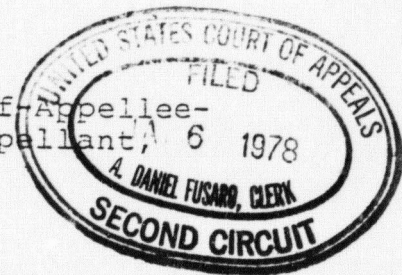
ROBERT A. LENNON,

Plaintiff-Appellee-
Cross-Appellant, 6 1978

-against-

UNITED STATES OF AMERICA,

Defendant-Appellant-
Cross-Appellee,



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX

DAVID G. TRAGER
United States Attorney,
Eastern District of New York

PAGINATION AS IN ORIGINAL COPY

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DATE	NR.	PROCEEDINGS	
2-27-76		Complaint filed. Summons issued.	(1)
3-2-76		Summons ret. and filed/ executed.	(2)
5-10-76		By COSTANTINO, J.-Stip. dtd 5-10-76 that the time for the deft to answer the complaint is extended to 5-30-76 filed.	(3)
5-26-76		ANSWER filed.	(4)
6-2-76		Pltff's first set of interrogatories & request for documents.	(5)
7-1-76		Before COSTANTINO, J.- Case called for conf and adjd to 7-22-76 for conf	
7-12-76		By COSTANTINO, J. - Order dtd 7-9-76 extending time of deft to answer interrogatories to 8-3-76 filed.	(6)
7-22-76		Before COSTANTINO, J- Case called. P/t conf held & adj'd to 11-24-76.	
8-3-76		USA answer s to interrogatories filed.	(7)
11-11-76x		Deft's interroga. to pltff's filed.	(8)
11-24-76		Before COSTANTINO, J. - Case called & adj'd to 2-28-77 for trial.	
12-3-76		Pltff's answers to deft's interrogatories filed.	(9)
1/31/77		Deft's supp answers to interrogatories filed.	(10)
2/9/77		Notice of motion ret 2/18/77 for an order dismissing the pltff first cause of action on the grounds set forth in the accompanying memo of points and authorities with memo of points and authorities in support of deft's motion to dismiss first cause of action filed.	(11)
2-17-77		Affidavit in opposition to motion to dismiss pltff's first cause of action filed with Memo of points & authorities.	(13)
2/18/77		Before COSTANTINO, J. Case called. Motion argued. Decision reserved. (Motion for an order dismissing pltffs first cause of action) <i>lg</i>	(14)
2-23-77		Deposition transcript of Robert A. Lennon filed.	(15)
2/23/77		Supp answers to pltff deposition taken on 12/7/76. filed.	(16)
2-28-77		Before COSTANTINO, J Case called & adj'd to 3-7-77 for trial.	
3/7/77		Before COSTANTINO, J. Case called. Trial ordered and begun. Trial continued to 3/8/77.	
3/8/77		Before Costantino, J--case called-trial resumed-trial contd to 3/9/77.	
3-9-77		Before COSTANTINO, J-Case called. Trial resumed. Trial cont'd to 3-11-77.	
3-10-77		Pltff's trial memo of law filed.	(17)
3/11/77		Before COSTANTINO, J. Case called. Trial resumed. Trial continued to 3/14/77. <i>lg</i>	
3/15/77		Before COSTANTINO, J. Case called. Trial resumed. Trial continued to 3/16/77. <i>lg</i>	
3/16/77		Before COSTANTINO, J. Case called. Trial resumed. Trial continued to 3/17/77. <i>lg</i>	
3/18/77		Before Costantino, J--case called-trial resumed Dr. Marvin Shelton sworn as witness on behalf of govt-trial contd to 3/24/77.	(18)
4-4-77		Before COSTANTINO, J.-Case called-Trial resumed-Trial concluded- Decision reserved-Findings of fact and conclusions of law to be filed by 5-20-77.	
4-4-77		Stenographer's transcripts dated 3-7-77; 3-8-77; 3-9-77 and 3-11-77 Filed.	(19, 20, 21, 22)
4/15/77		Stan's granscript dtd 4/4/77 filed.	(23)
4-20-77		Sten. transcript dtd 3-15-77 filed.	(24)
4-20-77		Sten transcripts dtd 3-16-77 and 3-17-77 filed. <i>mg</i>	(25/26)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF		DEFENDANT	DOCKET NO. <u>76 C 396</u>
ROBERT A. LENNON		U.S.A.	PAGE <u>2</u> OF <u>2</u> PAGES
DATE	NR.	PROCEEDINGS	
5/11/77		Pltffs prosposed findings of fact filed, and forwarded to chambers as requested. tk (27)	
5-31-77		Deft's proposed findings of fact and conclusions of law filed. ld (28)	
8-10-77		By COSTANTINO, J. - Findings of fact and conclusions of law dtd 8-10-77 directing Clerk to enter judgment in favor of pltff and against deft in the sum of \$600,000.00. filed. mm (29)	
8-11-77	556	JUDGMENT dtd 8-11-77 that pltff recover \$600,000 from deft filed. (p/c mailed to attys).mm (30)	
10/7/77		Notice of appeal filed. Docket entries and duplicate of Notice of Appeal mailed to the C of A. tk (31)	
11/7/77		Copy of scheduling order received from the C of A. t k (32)	
10/18/77		Notice of cross-appeal by pltff., on grounds of inadequacy filed. jm (33)	
11/9/77		By COSTANTINOJ - Order filed for supplemental findings of facts on the issue of damages. tk (34)	

7 3
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERT A. LENNON,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

396
COMPLAINT

-----x
Plaintiff, complaining of the defendant, by his attorney,
JOSEPH KELNER, ESQ., alleges as follows:

AS AND FOR A FIRST CAUSE OF ACTION,
PLAINTIFF, ROBERT A. LENNON, ALLEGES:

1. That this action is brought under the Federal Tort Claims Act, 28 USC § 1346 (b), 2671 et seq., as hereinafter more fully appears.
2. That the amount in controversy herein exceeds the sum of \$10,000, exclusive of interest and costs.
3. That on or about May 5, 1975, a claim was filed with the Navy Department, a department and/or agency of the defendant, the UNITED STATES OF AMERICA, on behalf of the plaintiff, ROBERT A. LENNON; six months having thereafter elapsed, said claim is deemed denied by the plaintiff herein, and this suit is now being duly and timely commenced.
4. That the defendant, UNITED STATES OF AMERICA, through its employees and through the Department of the Navy, at all times mentioned herein, did operate the hospital known as the St. Albans Naval Hospital, St. Albans, New York.
5. That on or about June 9, 1972, the plaintiff, ROBERT A. LENNON, was duly admitted to the aforementioned St. Albans Naval Hospital for examination, diagnosis, care and treatment for an injury to his right leg.

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6. That during this admission and subsequent admissions to the St. Albans Naval Hospital, the plaintiff, ROBERT A. LENNON, was treated exclusively by agents, servants, and/or employees of the defendant, UNITED STATES OF AMERICA, and was under their complete control.

7. That the defendant, the UNITED STATES OF AMERICA, by and through its agents, servants and/or employees, were careless and negligent in the manner in which they rendered care and treatment to the plaintiff, ROBERT A. LENNON, in that they failed to properly treat the plaintiff for the condition from which he was suffering; in failing to provide proper aftercare; in that they failed to perform their professional duties in accordance with the proper and reasonable standards of medical care prevailing in the community at that time; in failing to properly cast the right leg of the plaintiff; in failing to properly examine and inspect the plaintiff's right leg; in failing to diagnose and recognize the plaintiff's condition during the aftercare period; in failing to prevent the happening of said occurrence; in permitting the plaintiff's right leg to become infected; in failing to treat said infection and the defendant, by and through its agents, servants and/or employees were otherwise careless and negligent.

8. That the aforementioned occurred without any fault or negligence on the part of the plaintiff, ROBERT A. LENNON, contributing thereto.

9. That by reason of the negligence of the defendant, by and through its agents, servants and/or employees, the plaintiff, ROBERT A. LENNON, was caused to sustain serious and severe permanent personal injuries, including amputation of his right leg on or about October 29, 1974 and has sustained loss of earnings and a permanent impairment of his earning capacity and has suffered

and will continue to suffer great physical and mental pain and anguish.

10. That the plaintiff, ROBERT A. LENNON, has been under the continuous care and treatment by the defendant, UNITED STATES OF AMERICA, for the conditions complained of herein, from approximately June 9, 1972 until approximately December 18, 1974 and thereafter.

11. That by reason of the foregoing, the plaintiff, ROBERT AL. LENNON, has been damaged in the sum of TWO MILLION (\$2,000,000) DOLLARS.

AS AND FOR A SECOND CAUSE OF ACTION,
PLAINTIFF, ROBERT A. LENNON, ALLEGES:

12. Plaintiff, ROBERT A. LENNON, repeats, reiterates and realleges each and every allegation contained in paragraphs numbered and designated "1" through "11" with the same force and effect as though fully set forth herein at length.

13. That the defendant, UNITED STATES OF AMERICA, through its employees and through the Veterans Administration, a federal agency, at all times mentioned herein did operate a hospital located at Castle Point, New York.

14. That on or about May 3, 1975, a claim was filed with the Veterans Administration, a department and/or agency of the defendant, UNITED STATES OF AMERICA, on behalf of the plaintiff, ROBERT A. LENNON; nine months having thereafter elapsed, said claim is deemed denied by the plaintiff herein, and this suit is now being duly and timely commenced.

15. That on or about May 30, 1973, the plaintiff, ROBERT A. LENNON, was duly admitted as a patient to the aforementioned Castle Point Veterans Administration Hospital for examination, diagnosis, care and treatment for a condition involving his right leg.

15. That during this admission and subsequent admissions to the Castle Point Veterans Administration Hospital, the plaintiff, ROBERT A. LENNON, was treated exclusively by agents, servants and/or employees of the defendant, UNITED STATES OF AMERICA, and was under their complete control.

17. That the defendant, UNITED STATES OF AMERICA, by and through its agents, servants and/or employees were careless and negligent in the manner in which they rendered care and treatment to the plaintiff, ROBERT A. LENNON, in that they failed to properly treat the plaintiff for the condition from which he was suffering; in allowing and permitting the plaintiff to refracture his right leg on or about July 17, 1973; in failing to diagnose the fracture; in failing to properly and timely treat the fracture; in ignoring the complaints of the plaintiff; in failing to provide proper after care; in that they failed to perform their professional duties in accordance with the proper and reasonable standards of medical care and skill prevailing in the community at that time; in failing to prevent the happening of said occurrence; and the defendant, by and through its agents, servants and/or employees were otherwise careless and negligent.

18. That the aforementioned occurred without any fault or negligence on the part of the plaintiff, ROBERT A. LENNON, contributing thereto.

19. That by reason of the negligence of the defendant, by and through its agents, servants and/or employees, the plaintiff, ROBERT A. LENNON, was to sustain serious and severe permanent personal injuries including amputation of his right leg on or about October 29, 1974 and has sustained a loss of earnings and a permanent impairment of his earning capacity, and has suffered and will continue to suffer great physical and mental anguish and pain.

20. That the plaintiff, ROBERT A. LENNON, has been under

the continuous care and treatment by the defendant, UNITED STATES OF AMERICA, for the conditions complained of herein, from approximately June 9, 1972 until approximately December 19, 1974, and thereafter.

21. That by reason of the foregoing, the plaintiff, ROBERT A. LENNON, has been damaged in the sum of TWO MILLION (\$2,000,000) DOLLARS.

WHEREFORE, plaintiff, ROBERT A. LENNON, demands judgment against the defendant, UNITED STATES OF AMERICA, on the first and second causes of action, in the sum of TWO MILLION (\$2,000,000) DOLLARS, together with the costs and disbursements of this action.

Joseph Kelner
JOSEPH KELNER, ESQ.
Attorney for Plaintiff
Office & P.O. Address
225 Broadway
New York, New York 10007

CIS:es
File No.
760302

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERT A. LENNON, : ANSWER
Plaintiff, :
-against- : Civil Action
UNITED STATES OF AMERICA, : NO. 76 C 396
Defendant. :
----- X

The defendant, UNITED STATES OF AMERICA, by its attorney, David G. Trager, United States Attorney for the Eastern District of New York, in answering the complaint herein, alleges:

IN RESPONSE TO THE FIRST
CAUSE OF ACTION

FIRST: The allegations contained in paragraphs designated "1" and "2" of the complaint, although presenting questions of law which are for the Court to determine, are denied.

SECOND: Denies the allegations contained in paragraph designated "3" of the complaint, except admits that a Claim for Damage, Injury or Death (SF 95) was filed with the Department of the Navy on May 5, 1975.

THIRD: In response to the allegations contained in paragraph designated "4" of the complaint, admits that the St. Albans Naval Hospital, St. Albans, New York, was operated by the defendant at all times relevant to the complaint.

FOURTH: Denies the allegations contained in paragraph designated "5" of the complaint, and further alleges that the admission to the St. Albans Naval Hospital on June 10, 1972 was one of several admissions of the plaintiff to that hospital.

(4)

FIFTH: Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs designated "6" and "10" of the complaint.

SIXTH: Denies each and every allegation contained in paragraphs designated "7", "8", "9" and "11" of the complaint.

IN RESPONSE TO THE SECOND
CAUSE OF ACTION

SEVENTH: In response to the allegations contained in paragraph designated "12" of the complaint, defendant repeats, reaffirms and realleges each and every allegation heretofore set forth in paragraphs designated "FIRST" through "SIXTH" of this answer, with the same force and effect as if more fully set forth at length hereat.

EIGHTH: In response to the allegations contained in paragraph designated "13" of the complaint, admits that the Veterans Administration Hospital, Castle Point, New York, was operated by the defendant at all times relevant to the complaint.

NINTH: Denies the allegations contained in paragraph designated "14" of the complaint, except admits that a Claim for Damage, Injury or Death (SF-95) was filed with the Veterans Administration on May 5, 1975.

TENTH: Denies the allegations contained in paragraph designated "15" of the complaint, except admits that the plaintiff was first admitted to the Veterans Administration Hospital, Castle Point, New York on May 30, 1973.

ELEVENTH: Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs designated "16" and "20" of the complaint.

TWELFTH: Denies each and every allegation contained in paragraphs designated "17", "18", "19" and "21" of the complaint.

FIRST DEFENSE

THIRTEENTH: The defendant and its agents, servants and employees, exercised due care and diligence in all of the matters alleged in the complaint herein, and no act or failure to act of the defendant, or any of its agents, servants or employees was the proximate cause of any damage, loss or injury to the plaintiff.

SECOND DEFENSE

FOURTEENTH: Whatever damages or injuries may have been sustained by the plaintiff as a result of the incidents alleged in the complaint were caused solely or in part or were contributed to by reason of his negligence.

THIRD DEFENSE

FIFTEENTH: In resisting treatment and in being uncooperative while a patient at hospitals operated by the defendant, the plaintiff had knowledge of the risks involved in following his course of conduct, whatever injuries and damages may have been sustained by him were caused by said risks and he thereby assumed the risk of injury.

FOURTH DEFENSE

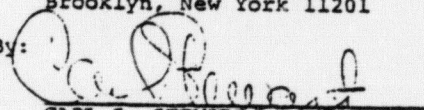
SIXTEENTH: With respect to any examination, diagnosis, care, or treatment of the plaintiff at the St. Albans Naval Hospital, the claim required to be presented to the appropriate Federal agency pursuant to the provisions of 28 U.S.C. §2675 was not presented within the applicable time period and accordingly any claim based on alleged negligence during the hospitalizations at that institution is barred by the statute of limitations.

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WHEREFORE, the defendant demands judgment
dismissing the complaint, granting judgment to it together
with the costs and disbursements of this action, and for
such other and further relief as the Court deems just and
proper in the circumstances.

Dated: Brooklyn, New York
May 25, 1976

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendant
225 Cadman Plaza East
Brooklyn, New York 11201

By:


CARL I. STEWART
Assistant U. S. Attorney
Chief, Civil Division

TO:
JOSEPH KELNER, ESQ.
Attorney for Plaintiff
225 Broadway
New York, New York 10007

A 12

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ AUG 10 1977 ★

TIME A.M. _____
P.M. _____

76-C-396

RECEIVED

FINDINGS OF FACT
and CONCLUSIONS OF
LAW

AUG 10 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERT A. LENNON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

-----X
COSTANTINO, D.J.

On June 9, 1972 plaintiff fractured his leg in a motorcycle accident. On October 29, 1974 his leg was amputated. In this action, plaintiff seeks damages from the United States, arguing that the amputation resulted from malpractice on the part of government physicians in treating his fracture.

The court makes the following findings of fact:

(1) After his accident plaintiff was treated at St. Albans Naval Hospital where the wound was debrided, the fracture set and a Lottes nail was inserted.

(2) On June 29, 1972 sloughing was noted; no cultures were taken, however.

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(3) A culture taken on July 6 indicated the presence of bacteria. Antibiotic treatment was not commenced until July 18, 1972. The delay until July 18 in combatting these bacteria by means of antibiotics was a deviation from the proper standard of care.

(4) From July 5, 1972 through September 1972 the general course of treatment given to plaintiff deviated from acceptable standards of care in two ways: (1) insufficient cultures were taken, and (2) the type and strength of antibiotics administered were improper.

(5) On July 28, 1972 as a result of improper care osteomyelitis had already set in. On that date, plaintiff underwent a skin-graft operation. The operation itself was performed improperly. The physician improperly drilled through bleeding bone and improperly attempted to graft dead skin over dead bone. In addition proper medical treatment would have required the use of suction and drainage. This was not done.

(6) Only four days after the skin-graft operation, plaintiff was improperly permitted to clean and dress the site of the skin graft himself. These procedures should

have been performed by trained personnel under sterile conditions.

(7) Suction-irrigation was begun on December 13, 1972.

(8) Although proper treatment commenced in December, 1972, the infection had by that time become extensive and the treatment proved ineffectual.

(9) On October 29, 1974 chronic osteomyelitis necessitated amputation of plaintiff's right leg.

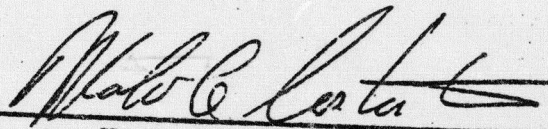
Conclusions as to Liability

Under the facts of this case the United States is liable for the negligent acts of its physicians. See 28 U.S.C. §§ 2674, 1346; Bing v. Thunig, 2 N.Y.S.2d 656 (1957). The physicians who treated plaintiff acted contrary to accepted medical standards. This deviation from accepted practice allowed the plaintiff's bone infection to become irreversible and unresponsive to proper care. Eventually the infection led to the amputation. In the absence of the improper treatment the infection likely would have been cured and plaintiff would have had an excellent chance of

recovery. Plaintiff is therefore entitled to recover damages from the defendant for malpractice.

Damages

The evidence introduced to establish plaintiff's loss of earnings was speculative, at best. While plaintiff has proved that the range of jobs available to him is reduced he has not proved that his residual earning capacity has been diminished. This court, after considering all the evidence including the medical evidence and testimony relating to plaintiff's pain, suffering and future medical
1
needs/ concludes that plaintiff is entitled to recover the sum of \$600,000 from defendant. The Clerk of the court is directed to enter judgment accordingly.


U. S. D. J.

1/
The evidence relating to the necessity for further medical care is convincing and not speculative.

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U.S. DISTRICT COURT E.D.N.Y.

AUG 11 1977



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERT A. LENNON,

Plaintiff,

- against -

UNITED STATES OF AMERICA,

Defendant.

TIME AND

PLA.

JUDGMENT

76 C 396

A memorandum and order of Honorable Mark A. Costantino,
United States District Judge, having been filed on August 10, 1977,
granting plaintiff damages from the defendant for malpractice in the
sum of \$600,000, it is

ORDERED and ADJUDGED that the plaintiff shall recover
damages in the sum of \$600,000 from the defendant.

Dated: Brooklyn, New York
August 11, 1977

Lewis Orgel
Clerk

AAS:ESR:gp
F. 760302

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
ROBERT A. LENNON,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.
----- X

NOTICE OF
APPEAL

Civil Action
No. 76 C 396

SIRS:

PLEASE TAKE NOTICE that the defendant, the
United States of America, by its undersigned attorney,
hereby appeals to the United States Court of Appeals for
the Second Circuit from the judgment entered in this
action on August 11, 1977.

Dated: Brooklyn, New York
October 6, 1977

Yours, etc.

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendant
225 Cadman Plaza East
Brooklyn, New York 11201

By:

Edward S. Rudofsky
EDWARD S. RUDOFSKY
Assistant U.S. Attorney

TO:
CLERK
UNITED STATES DISTRICT COURT

Joseph Kelner, Esq.
225 Broadway
Suite 1501
New York, N. Y. 10007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A 18

ROBERT A. LENNON,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

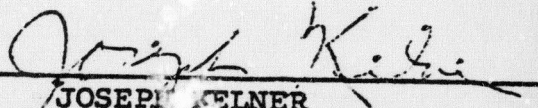
NOTICE OF CROSS-APPEAL

Civil Action
No. 76 C 396

S I R S:

PLEASE TAKE NOTICE that the plaintiff hereby cross-appeals from so much of the judgment entered herein in behalf of the plaintiff which grants to the plaintiff the sum of \$600,000.00 upon grounds of its inadequacy.

Dated: New York, New York
October 13, 1977


JOSEPH FELNER
Attorney for Plaintiff
Office & P.O. Address
225 Broadway
New York, New York 10007

TO: DAVID G. FRAGER
United States Attorney
Eastern District of New York
Attorney for Defendant
225 Cadman Plaza East
Brooklyn, New York 11201

EDWARD S. RUDOFISKY
Assistant U.S. Attorney

CLERK
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

19

-----X
ROBERT A. LENNON,

76-C-396

Plaintiff,

v.

SUPPLEMENTAL
FINDINGS OF
FACT

UNITED STATES OF AMERICA,

Defendant.
-----X

NOV 8 1977

COSTANTINO, D.J.

The court supplements its findings of fact on the issue of damages as follows:

1. Prior to the time of the amputation, plaintiff was a normally active young man who played baseball (14), swam (15), played football (34), played basketball (34), went camping and hunting (34), and went dancing frequently (15, 34). Since the amputation, plaintiff has been able to do none of those activities.
2. Plaintiff's life expectancy is 45 years.
3. Plaintiff suffers constantly from pain, including "phantom pain," i.e., pain where his foot used to be (84-86, 273-274). This pain is real, rather than imaginary (273).
4. Plaintiff is unable to sleep through the night, because he is awakened either by the phantom pains

*Numbers in parentheses refer to pages in the trial transcript.

or by his right leg bumping against his left leg (105). When plaintiff is awakened, which occurs approximately five times a week (88), he must get out of bed to soak his stump (87-88). The soaking procedure takes one and one-half to two hours (88). On occasion, plaintiff has been awakened more than once in one night (88).

5. Plaintiff's social life has been significantly diminished since the amputation (123-127).

6. Plaintiff is not able to wear his prosthesis for extended periods of time, since, when he wears the prosthesis and puts weight on his stump, the stump tears and opens and begins to drain (102). He must then remove the prosthesis for several days to allow the wound to close (265). After a few more weeks of wearing the prosthesis, the cycle begins again (265).

7. The tearing of plaintiff's stump is due to a condition known as cellulitis, which, as it now stands is permanent (266), and which is not treatable by medication alone (266).

8. In order to correct his present condition, it would be necessary for plaintiff to undergo a stump revision, whereby the infected tissue would be removed (266, 563).

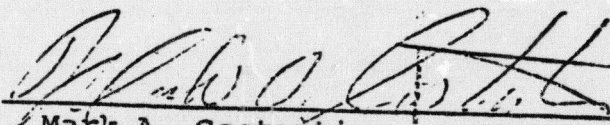
9. Plaintiff presently has a ²¹stump which extends four and one-half inches below the knee (267). In order to perform a stump revision, an additional inch and one-half would have to be removed (267).

10. Because of the length of time the infection has been present and the number of episodes of recurring infection, there is only a fifty percent chance that a stump revision would be successful (267, 652).

11. If a stump revision were performed and the infection were to recur, it might be necessary to reamputate above the knee (267). Such a procedure would be more functionally disabling to plaintiff than is his present condition (267-268).

12. Plaintiff is presently taking sleeping pills, Valium and Percodan (643). Plaintiff has developed a drug dependency on Percodan (643-644).

13. The parties agree that barring any unexpected complications which may arise, plaintiff's future medical costs will be approximately \$25,000.


Mark A. Costantino

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERT A. LENNON,

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

76-C-396

United States Courthouse
Brooklyn, New York

March 7, 1977
10:00 o'clock A.M.

Before:

HONORABLE MARK A. COSTANTINO, U.S.D.J.

EMANUEL KARR
OFFICIAL COURT REPORTER

Appearances:

JOSEPH KELNER, ESQ.
JAMES H. DEUTSCH, ESQ.
Attorneys for Plaintiff

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: EDWARD S. RUDOFISKY, ESQ.
Assistant U.S. Attorney

EX/tk

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THE CLERK: Robert A Lennon versus United States
of America, case on trial.

THE COURT: We are proceeding with this case, as
you may have learned, my criminal calendar has been
abated.

MR. KELNER: Your Honor, may we give you a
marked copy of the pleadings?

THE COURT: Yes.

Is the original marked?

MR. KELNER: No, your Honor.

THE COURT: All right, we will go by that one.

Is it necessary to make an opening statement,
or would you just rather start with a witness?

MR. KELNER: Before we commence, your Honor,
I would like to move that all witnesses be excluded
from the courtroom, that is, those who are going to be
testifying as to the substance or the factual background
related to the cause of action for negligence and
malpractice.

Now, I notice that sitting at counsel table is
a doctor who was very active in various cases of the
plaintiff's treatment, and I would like to request
that he be excluded.

THE COURT: Well, let me hear what you have to
say.

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2 MR. RUDOFISKY: Your Honor, it is true that
3 Dr. Smith was one of the treating physicians at the
4 Brooklyn Veterans Administration Hospital, but I think
5 at the outset I ought to say that apparently most of
6 the controversy that is raised in the pleadings and in
7 the discovery does not involve his portion of the
8 treatment. I could be wrong about it, but I don't
9 think I am. He was certainly not one of the treating
10 naval physicians.

11 In any event, your Honor, he is here primarily
12 to advise me and if the Court were to rule that he
13 could not advise me at counsel table and while it may
14 result in a disadvantage, nevertheless I assume there
15 are other doctors available, but they are not here this
16 morning, although I would make an effort to get one,
17 but yet I would not have the benefit of a doctor
18 listening to plaintiff's testimony.

19 MR. KELNER: There is also one more thing,
20 counsel has not stated that this doctor will not be
21 testifying as an expert for the defendant in expressing
22 opinions, in which event I think he should be excluded
23 unless counsel is ready to state now for the record
24 that he definitely will not be called to express any
25 opinions as an expert, and if so then I will withdraw

1
2 any objection I have.

3 THE COURT: As I understand this case, there are
4 doctors that directly performed a part of the treating
5 physicians' services and others who performed some
6 services but that they are not being sued --

7 MR. KELNER: That is correct.

8 THE COURT: (cont.) -- as individuals.

9 Now, as such, of course if may be true that he
10 is not a defendant, which ordinarily would exclude him,
11 but under the circumstances and the peculiarities of
12 the case and the particulars of this case, I think it
13 would be an unfair way of handling the matter to
14 exclude the doctor when he might be advising the attor-
15 ney as to certain particular items in the case.

16 Now, I don't know whether he is going to give an
17 opinion, but I don't think that would change my
18 opinion as to his being permitted to remain here.

19 MR. RUDOFISKY: While my decision is not final,
20 the likelihood is that he will testify and he will be
21 asked to give his opinion --

22 THE COURT: You mean as to his part or involve-
23 ment in the proceedings or giving his opinion as to a
24 hypothetical question of some sort?

25 MR. RODUFSKY: It is so certainly for the first

part of the question, definitely, yes, as to the last part, I would not want to foreclose that.

But what I'm trying to say is that my understanding of what we are going to do here this morning is to listen to the plaintiffs, not to listen to his expert witness, so I can't see how the plaintiff is being prejudiced.

What I am specifically asking at this time is that Dr. Smith be allowed to listen in advance to the plaintiff's testimony and not to plaintiff's expert and then if the Court were to advise me that plaintiff is going to renew this motion, then then I will not have Dr. Smith here, I would certainly make arrangements to have a non-witness advisor sit with me.

MR. KEINER: Let me save time --

THE COURT: I don't see any real harm, I doubt very much it is going to have that great of an impact if the doctor sits there and advises you or not, I assume whatever testimony he is going to give is not going to be altered by what the plaintiff says in particular, nor will he change his medical expertise as far as giving an opinion as to what he believes is a fair and proper result as to the type of discretion that was used.

1
2 MR. KELNER: There is one thing I want to
3 clarify, and I'm going to withdraw any objection in
4 view of your Honor's statement in this case, and that
5 is this, that Dr. Smith came long after the principal
6 acts of the so-called medical malpractice were
7 committed, so there is no question that he in any sense
8 was implicated directly or indirectly in any improper
9 practices as far as I presently can recall.

10 THE COURT: But ground questions will be asked
11 of him leading up to the point when he did become
12 involved in this case as attending the patient and the
13 resulting effect, but I don't think that is a reason
14 for excluding a witness in a courtroom.

15 MR. KELNER: Very well, I will withdraw the
16 request, your Honor.

17 THE COURT: All right.

18 MR. KELNER: Shall we proceed, your Honor?

19 THE COURT: yes, let us proceed.

20 MR. KELNER: Mr. Lennon, come up, please.

21 R O B E R T A . L E N N O N , called as a witness in
22 his own behalf, having been duly sworn by the Clerk of
23 the Court, testified as follows:

24 MR. KELNER: Your Honor, may I go off the record
25 for a moment?

THE COURT: Surely.

(Discussion was held off the record.)

DIRECT EXAMINATION

BY MR. KELNER:

Q Mr. Lennon, where were you born?

A In Brooklyn.

Q And where did you go to school?

A St. Catherine's of Genoa, then Walt Whitman, then Erasmus Hall.

Q Bob, when were you born?

A May 3, 1951.

Q So that you are now 25 years old; is that correct?

A Yes.

Q And the schools that you told us you went to, how far did you go in school?

A In parochial school I went six years, then I continued in junior high school.

Q You went to the parochial school, St. Catherine of Genoa here in Brooklyn; is that correct?

A Yes.

Q And then what high school did you attend?

A Erasmus Hall High School.

Q And how far did you go at Erasmus Hall?

A Four years.

Q And did there come a time before you were graduated that you went into the military service?

A Yes.

Q And did you enlist, sir --

MR. KELNER: I am going to lead, if there is no objection, on material that is not in dispute, if there is no objection.

THE COURT: All right.

Q Did you enlist in the United States Marines?

A Yes, I did.

Q What year was that?

A 1969.

Q And was that before you obtained your high school diploma?

A Yes, it was.

Q In 1969 you were then 18 years of age; is that correct?

A Yes.

Q Now, up to that time, sir, had you had any major illnesses in your life?

A No.

Q Had you ever had any serious injury in your life up to the time you went into the military service?

A No.

Lennon - direct

10

Q And what in general, based upon your activities and your memory, what was your general health and the level of activity up to the age of 18?

A Good.

Q Did you have any diseases at all up to that time?

A No.

Q All right.

By the way, were you living with your parents?

A Yes.

Q And your father, may I ask what his occupation was?

A New York City policeman.

Q Is he now a retired policeman?

A Yes.

Q And where does your mother and father live now?

A Upstate New York.

Q What does your father do at this time?

A He is a chief court officer of Dutchess County.

Q The Chief Court Officer?

A Yes.

Q That would be in Poughkipsee?

A Yes.

Q All right. Do you have brothers and sisters?

A Yes.

1

2

Q How many?

3

A Eight.

4

Q Eight brothers and sisters?

5

A Yes.

6

Q All right.

7

And, by the way, is the young lady in the front row your sister?

8

9

A Yes.

10

Q Older or younger than you?

11

A Older.

12

Q She is married, is she?

13

A No.

14

Q She is single?

15

A Yes.

16

Q All right.

17

Now, when you went into the military service, where did you obtain your basic training?

18

19

A Parish Island.

20

Q Parish Island, where the marines are trained?

21

A Yes.

22

Q Did you successfully complete the basic training?

23

A Yes, I did.

24

Q And then did there come a time when you went to

25

Vietnam?

Lennon - direct

12

1
2
3 A Yes.

4 Q Were you in combat?

5 A Yes.

6 Q What branch of service?

7 A In the Marine Corps.

8 Q Did there come a time when you were in the
9 Marine Corps in Vietnam when you sustained some injury?

10 A Yes.

11 Q Tell us about it briefly.

12 A We were on patrol and there was incoming fire,
13 coming from the enemy, and we sustained some damage. It was
14 a missile, a rocket that got us.

15 Q And were there a number of casualties among the
16 American marines at that time?

17 A Yes, yes, a few.

18 Q What happened to you, sir, at that time?

19 A My left leg and my elbow and my left ear were
20 injured.

21 (continued next page)
22
23
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EK/tk 1

Lennon - direct

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1am2 2

Q And were you hospitalized in a military hospital?

3

A Yes, I was, sir.

4

Q And where was that?

5

A I was on Hopping Medical Evacuation, they started in Danang, then to Saigon, then to Japan for a week, then hopping from hospitals to finally St. Auburn's.

8

Q You say hopping, you mean you were carried by plane from one hospital to another?

10

A By plane, by medical Red Cross plane.

11

Q Just briefly, I don't want to go into details about that left leg, but what was it as you came to understand it?

14

A It was the inside of it which was shot, the inside of the knee --

16

Q It was an injury to your left knee?

17

A Yes, sir.

18

Q Was there an operation on it?

19

A A couple, yes.

20

Q Just briefly --

21

MR. KELNER: I am leading, sir, to save a little time, if I may --

23

Q (cont.) -- was there something done with the cartilage in the knee joint?

25

A As far as I know they tied it and pinned it.

Lennon - direct

14

Q And then after they tied it and pinned it you were discharged from military service and how long -- withdrawn.

When were you discharged from the military service?

A Well, I think it was in the fall, in the fall.

Q Did there come a time that at or about that time when you became fully active on that left leg as you were then on the right leg?

A Yes.

Q Well, in what year were you discharged?

A I was discharged in the fall of 1971.

Q That would be around September 1971?

A Yes.

Q And how was your left leg and knee functioning at that time?

A Quite well, they had given me a brace, I got a brace and with the brace it was doing well.

Q And can you tell us what your activities were, just briefly, what did you do in the way of any sports or walking or whatever you can remember?

A Quite a bit of sports, I could play baseball, I would be running, I was asked, I was requested to do a lot of running to build up my leg.

Q The doctor had told you to do that?

A Yes, the more exercise the better, and swimming

was recommended, I would swim very well and I did a lot of swimming.

Q How did you walk at that time, did you walk with a limp or with a normal gait?

A I didn't limp.

Q You did not?

A No.

Q Did you have pain in the left leg at all?

A No.

Q And were you, in your own words, would you say you were completely functional or normal or partly so or just how would you describe it as you were functioning and engaged at least in walking and working?

A I could work, I was in good shape, I could work a full day and participate, I could dance and go out at night.

Q Did you go out dancing with girls?

A Yes.

Q You were then what, 18 years old?

A No, I was 21.

Q When you were discharged?

A Yes.

Q In 1971?

A Yes, 21.

Q Now, you had gone into service in 19 - I think,

August, 1969; is that correct?

A Yes.

Q When you got out was it then about September of 1971?

A Right.

Q 19?

A 1971.

Q 1971, all right.

Now, before you went into service, that is, when you were 18 years of age, and going back a few years before that, had you worked anywhere doing anything at all?

A I started working very young.

Q You did?

A Yes, newspapers, delivering newspapers.

Q I can't hear you.

A And I worked in the local grocery store delivering groceries.

Q You went to school, didn't you?

A Yes, sir, I did that after school or during the summer.

Q And you worked during the summers?

A Sure.

Q Were you ever in any trouble or were you ever convicted of a crime in your life?

Lennon - direct

17

1
2 A No.

3 Q Were you given an honorable medical discharge
4 from the Marine Corps after you were injured?

5 A Yes, I was.

6 Q Now, sir, as a boy, before you went into the
7 military service, you had sold newspapers after school and
8 did you work in a grocery store, also?

9 A Yes, I worked in a grocery store, in a launder-
10 mat, I delivered laundry, anything I could work at, we had a
11 big family.

12 Q You were living with your mother and father?

13 A With the whole family, yes.

14 Q How old were you when you were doing those things?

15 A Twelve, thirteen.

16 Q Okay.

17 Now, did there come a time when you became
18 interested in any particular occupation or trade?

19 A Yes.

20 Q What was that?

21 A I was working for a friend of my mother's, a
22 jeweler, I was helping him in and around the jewelry store
23 after school.

24 Q In a jewelry store?

25 A In a jewelry store, yes.

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Q And where was that jewelry store located?

A On Church Avenue, Brooklyn.

Q What is the name of it?

A Impressive Jewelers.

Q That was a retail reighborhood jewelry store?

A Yes, sir.

Q What were you doing in the jewelry store?

A I helped him open up in the morning and set out all the jewelry, helped got the shop ready for people and helped him close up at night after school.

Q How old were you when you worked in the jewelry store?

A Fourteen, fifteen sixteen.

Q Didn't you need working papers or did they look the other way?

A Until I was old enough, they looked the other way.

Q And while you were working in the jewelry store -- would that be in the morning before going to school?

A Yes, we had a late shift, I would go in at 11 o'clock and get out at 4:30, 5 o'clock.

Q Out of school?

A Out of school and helped him.

Q After school did you work there, too?

A Yes, I did, I helped him, I would stay after

1
2 school till closing at 9.

3 Q And where would you eat?

4 A Well, he would get me a sandwich and if
5 there was any light I would do my homework there.

6 Q During that time, this is all before you went
7 into the military service, did there come a time when you got
8 into the field of electricity?

9 A Yes.

10 Q How old were you when you first became
11 interested in that?

12 A Seventeen, I believe.

13 Q And tell us, how did you get interested in that
14 while working at the jewelry store?

15 A The jewelry store was doing pretty good, they
16 decided to take the apartment in the back and make it into a
17 shop to do their own jewelry work, to put in a bigger safe,
18 a lot of electrical machines to clean jewelry and to bring in
19 a watchmaker, so they hired the electrician down the block.

20 Q You say the jewelry store hired this electrician
21 down the block to put in this electrical equipment or lines?

22 A Renovations, all new services, new electrical
23 lines.

24 Q And they were put into the jewelry shop itself?

25 A Yes.

1
2 Q And you were still working at the jewelry store?

3 A Yes.

4 Q How did you get into this electrical thing?

5 A I did a lot of it, I helped him out, they needed
6 help, I asked the mechanic all the questions about the
7 electricity and how it worked and they were working there.

8 Q What was the name of that electrical company
9 that was putting in this installation work in the jewelry store?

10 A Rothbel Electricians.

11 Q You say their office or their shop was down the
12 block?

13 A About three stores down.

14 Q About three stores down?

15 A Yes.

16 Q Did you become acquainted with any of those
17 Rothbel electrical people?

18 A Yes, I did, I asked Richie, the man that worked
19 there, the mechanic, to show me about electricity and he told
20 me I had to go to the library and get a book out.

21 Q Did he tell you what electrical book to get?

22 A Yes, there are a couple, there are a couple of
23 books. I wanted to learn a little bit, I got that out and
24 that is how I started getting interested.

25 Q Did you go to the library to follow up your

1
2 interest in electricity?

3 A Yes.

4 Q What did you get there?

5 A The Fundamentals of Electricity.

6 Q What did you do, work?

7 A I read it through and started finding out what
8 it was all about.

9 Q Now, while they were doing this job in the
10 electrical shop, what did you do regarding their work, if
11 anything?

12 A I just helped them hook up Bx cable.

13 Q What is Bx cable?

14 A It is the cable you use in New York State, New
15 York City, specifically it is wires inside the cable, a steel
16 cable protecting the wire.

17 Q Did you learn those terms in connection with
18 Rothbel and the studies in electricity, the book?

19 A Yes, mainly on the job from them.

20 Q Were they willing to teach you or train you as
21 they were working there on this job?

22 A They offered me, I asked them for a job, they
23 offered it to me.

24 Q Did you get a job with Rothbel after that?

25 A Yes, I did.

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Q When did you work for them for the first time?

A It was, it was, I think it was in 1968, the end of 1968, the beginning of 1969.

Q How many months did you work for Rothbel directly after leaving the jewelry store?

A I think it was about a month.

(continued next page)

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2

Q When would you work with them?

3

A After school.

4

Q You were going to school, weren't you?

5

A Now I was in the early session, I was going in at 7 and getting out at 12:30, one.

7

Q You were going at 7 and getting out at 12:30?

8

A Yes.

9

Q Then you would go to school in the afternoon?

10

A No, that is when I went to work, at one, I went to school early.

12

Q I see, you went to work in the afternoon, you went to school in the morning and worked for Rotbel in the afternoon?

14

15

A Right.

16

Q What kind of earnings did you have working in the afternoon?

17

18

A It varied for the week, they would give me 75.00, the next week \$100.00, depending upon how long I worked.

20

21

Q Was that job called an electrical or an electrician apprentice?

22

23

A An electrical apprentice, that is what the title is in the union.

24

25

Q In the union?

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A Yes.

Q By the way, what union is it, and I will use the word jurisdiction, had control over all --

A In New York City?

Q You have to wait until I finish my question because this gentleman has to write down what you say.

What union has control and supervision over the electrical work in Brooklyn?

A Local Three.

Q And did you become aware of the procedure regarding working as an electrical apprentice? And then what they later become after a certain number of years?

MR. RUDOFSKY: Excuse me, Mr. Kelner.

Your Honor, I had no objection to the witness answering questions, but I do want to state for the record that the Government certainly won't concede that what he is going to testify to is necessarily the fact of what one must do in the electrical industry, but I have no objection if he testifies to the best of his knowledge.

MR. KELNER: Incidentally, your Honor, this is subject to further connection later.

THE COURT: All right.

MR. KELNER: We will have some one on this subject

1
2 THE COURT: All right.

3 BY MR. KELNER:

4 Q But did you learn, subject to connection, what
5 is the procedure, what number of years that a person works
6 as an electrician's apprentice and then goes on to a higher
7 rank in union rating?

8 A You start out as an apprentice at a set
9 salary and they work you, doing apprentice work, for five
10 years, I believe it is in local 3, and then after five years
11 you get a book to become the top mechanic in whatever line
12 you work as a mechanic, and it can be house wiring, you can
13 be a mechanic and do motor work.

14 Q What is the next rank after five years of
15 apprenticeship, what is that called?

16 A You become, you get a book and you are a mechanic.

17 THE COURT: What is it called, is it a journeyman?

18 A Yes.

19 Q A journeyman, what is a journeyman, a journeyman
20 mechanic, if you call tell us?

21 A He is the top man, he is the top electrician,
22 he can do any wiring.

23 Q And how long do you have to be working as an
24 apprentice electrician before you can then graduate and get
25 that rating?

1

2

A It is at least five years, five years at the

3

least.

4

Q Ok, all right.

5

Now was that or was that not your ambition to do that?

6

A That is what I wanted to do, yes.

7

Q And so when you worked for Rotbel for eight months,

8

what kind of work did you do during that eight months working

9

after school?

10

A I helped him with tools and I did small wiring,

11

small outlets, small electrical hook-ups, small lights,

12

nothing major, I would help him with the main service.

13

Q Help him laying the lines and making connections

14

on things?

15

MR. RUDOFSKY: Your Honor, at this point I

16

will object to any leading questions.

17

MR. KELNER: I will withdraw it.

18

THE COURT: I would say that it is kind of

19

leading.

20

All right.

21

Q Tell us, what if anything you would do with

22

regard to heavy work or major work with people from whom

23

you were learning experience?

24

A I had to carry my own weight, I had to ferry

25

myself, I went down to get a ladder, too, like everybody else,

1 more so than, I imagine, a journeyman.

2 Q How about the actual electrical work, what if
3 anything did you do about that?

4 A They would teach me everything that I would do,
5 they were actually teaching me each step that I took, red wire
6 has to go with red wire, yellow wire may have to go to a
7 different wire, it depends upon whatever it is you are doing.

8 Q Did you learn what the purpose of different
9 colors of wires were and --

10 MR. RUDOFISKY: Your Honor, I will object to
11 that question as leading.

12 THE COURT: Rephrase it.

13 BY MR. KELNER:

14 Q What if anything was done with you regarding
15 teaching and training you concerning these various things
16 that were being done?

17 A They would attempt to teach me anything they
18 could, everything they could about the electrical field, and
19 I had visions of going into the union, I did want to go into
20 the union.

21 Q Now, you were then -- was that at or before the
22 time you enlisted in the Marines?

23 A Yes.

24 Q Ok.

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When you enlisted in the Marines, were you still living at home with your father and mother and brothers and sisters?

A Yes, I was.

Q And you have told us about your military service, when did you get your high school diploma?

A In 1971.

Q This was after you had been injured in Viet Nam and after you were discharged from the service; is that correct?

A No, it was during.

Q During?

A While I was in the hospital I would go to school, I would come into Brooklyn, I was out in Queens, I would come into Brooklyn two nights a week to finish school.

Q While you were in the hospital they were letting you go at night to finish getting your high school diploma?

A Yes.

Q And you did get that?

A Yes.

Q Very good, all right.

When you got out of the hospital and after you were discharged, I am now going passed that point, and when you describe how you were able to get around on that left leg,

1
2 that left leg was better to the extent you have to describe
3 to his Honor, what if anything did you do regarding getting
4 a job?

5 A After I got out of the hospital?

6 Q Yes.

7 A I tried to go back to Rotbel Electric.

8 Q That is where you had worked about eight months
9 before you went into the service?

10 A Yes, sir.

11 Q And that was the electrical company?

12 A Yes, sir.

13 Q Did you get a job there?

14 A No, there was no work, construction was done.

15 Q At that time?

16 A Yes.

17 Q All right.

18 Well, did you do any occasional jobs at all for them
19 or anything at all?

20 A No, I went to them but they said there was
21 no work, so I started working for a couple of friends I knew.

22 Q Doing what?

23 A General contracting.

24 Q Was there a name to the company that you worked
25 for after you got out of the military service?

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A Yes, Vetco.

Q Is that Vetco?

A Yes.

Q Meaning Veterans Company?

A Veteran Contracting.

Q Who were those young men who started that
company?

A Ex-servicemen, guys.

Q What kind of work did they do?

A All sorts, one of them was new plumbing, another
one new bricks and concrete and mason work and we all did
painting.

(continued next page)

1

2

Q What did you do?

3

A Most of the electrical work.

4

Q You were how many veterans, how many veterans

5

were there in that Vetco Company?

6

A Four.

7

Q You knew all of them either from the service or

8

from the neighborhood?

9

A Yes.

10

Q And you were the electrician from this group?

11

MR. RUDOFISKY: Objection.

12

MR. KELNER: I will withdraw it.

13

Q Was anyone else other than you doing the

14

electrical work for that Vetco Company while you were there?

15

A Another fellow helped me, but I was doing the

16

electrical work.

17

Q Can you tell us when did you work there or for

18

how long you worked there after you got out of the service?

19

A I think it was five months.

20

Q And this work that the Vetco Company would do

21

and you were doing what you have told us, for ~~whom~~ ~~were~~ ~~they~~

22

doing this work?

23

A Anyone, anyone that had work to be done, we

24

would canvas and ask them in the neighborhood, anyone if

25

they needed any contracting done.

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Q And they would do what, would they be building new houses or working on existing structures?

A On existing structures, general repair.

Q Ok, very good.

About how much did you earn while you were doing that?

A I think it was about \$150.00.

Q A week?

A A week.

Q Now, was there any difficulty that you were having, physically speaking, stemming from the Viet Nam injury in doing this work after you got out of the service?

A No, on the contrary.

Q What is that?

A On the contrary, the leg with brace was stronger.

Q The leg with the brace was stronger?

A Yes.

Q Tell us what physical things were you doing in connection with work?

A I could do the forty foot peaks on the houses.

Q What do you mean by that?

A Houses in Brooklyn are very high, they are three story, they go up forty feet, and you in no way could extend a ladder up to forty feet, but I could go out --

Q What would you do, what would you do?

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A I felt a little more stable, I would go up and paint the peaks if we had to.

Q Did you go up on 40 foot ladders?

A Yes.

Q Was there any problem about that left leg?

A None whatsoever.

Q And at that time you had never had any problems with the right leg; is that correct?

A No.

Q Ok.

And just briefly, the work of an electrician besides going on ladders sometimes, what do you have to do with your body and your legs, that is what the average able bodied electrician must do to keep up with his work.

MR. RUDOFISKY: Your Honor, I am going to object to that, there is no showing that his experience qualifies him to testify as to what the average able bodied electrician does.

THE COURT: What did he do ?

MR. RUDOFISKY: Let us find out what he did while he was doing these other things.

THE COURT: What he had to do.

BY MR. KELNER:

Q What did you have to do in order to do any and

1
2 all your work?

3 A Bending, stooping, sitting, lifting, a lot of
4 physical activities, a lot of physical exercise.

5 Q All right.

6 And in addition to doing all of those things as you
7 have told us after you got out of the service, did you have
8 any hobbies, sports, social activities, which took some
9 physical doing?

10 A Yes, quite a bit.

11 Q Tell his Honor about it, please.

12 A I used to play football alot and swim and go
13 out, I used to go out dancing quite a bit.

14 Q Did you enjoy those things?

15 A Yes, very much so.

16 Q When you got out of the service, how old were
17 you?

18 A 20, 21.

19 Q And did you ever do any other things, that is
20 athletics?

21 A Yes, I had played basketball a lot, camping and
22 hunting, I used to do a lot of outdoors.

23 Q Did you ever go bowling or jogging?

24 A Yes, sir, I used to do calisthenics, the doctors
25 told me to keep up the exercises.

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2

Q How tall are you?

3

A 74 inches, 71 inches, different heights.

4

Q Are you six foot tall?

5

A About six foot.

6

Q You are six foot tall?

7

A Yes.

8

Q Now, did something happen to you on June 9th,

9

1972?

10

A Yes.

11

Q Were you working at that time?

12

A Yes.

13

Q Where?

14

A The store I was working at?

15

Q Well, I mean for what company?

16

A Vetco.

17

Q That is the company you told us about that

18

these veterans had; is that correct?

19

A Yes, sir.

20

Q Were you working part time, full time?

21

A Full time.

22

Q Do you remember whether you were working that

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day when you were injured in an accident?

24

A Yes, very well.

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Q And at about what time did it happen?

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A 5:30.

Q Where had you been that day?

A At the Delicatessen, we were doing two apartments
above the delicatessen.

Q What do you remember doing?

A Painting the hallways, putting in new outlets,
fixing it up for new tenants.

Q Doing electrical work?

A Yes.

Q And you had done that that day?

A Yes.

Q And on the way home, by the way, were you on
a motorcycle?

A Yes, I was.

Q And by the way, were you fully able to operate
the motorcycle without any difficulties regarding your left
leg at that time?

A Quite able to, yes.

Q What?

A Yes.

Q Any problem at all about that?

A None.

Q Ok.

And was that your usual transportation to and from

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A Yes.

3

4

Q Did you have a license to operate the motor vehicle?

5

A Yes.

6

7

Q And were you the registered owner of the motorcycle?

8

A Yes.

9

Q Just briefly, and I don't want to go into detail, but how did that accident happen?

11

12

13

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A I was making a left off a big intersection, Kings Highway, and the man came from the service lane, they assumed he was trying to get into the main stream of traffic, and he didn't hit his break and he hit me.

15

16

Q I would like to bring this out now, if I may, sir:

17

18

Was a claim put in in your behalf with regard to the injury that you sustained in that accident?

19

A Yes.

20

21

22

Q And was a full and complete payment made to you on the basis of the fact that the man had struck you by changing his lane from the service lane to the outer lane?

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A Yes.

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MR. KELNER: I would like to state the amounts, if I may, for the record at this time.

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THE COURT: Yes, you may proceed.

MR. KELNER: It is a fact that he had only \$10,000 insurance policy and the insurance company paid the entire amount of money for that to you?

THE WITNESS: Yes.

MR. KELNER: Is that correct?

THE WITNESS: Yes.

MR. KELNER: All right.

BY MR. KELNER:

Q Now, were you taken from the scene of that accident?

A Yes.

Q And where were you taken?

A To the Brookdale General Hospital, I think it is called.

Q And how long were you at the Brookdale?

A A couple of hours.

Q And essentially, was the main injury that you had in that accident to your right leg?

A Yes.

Q That is the leg that never had any injury at all before; is that correct?

A Right.

Q And just briefly, what was done for you for five

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hours at the Brookdale Hospital?

A Emergency treatment, they took x-rays, they cleaned it up.

Q And then did there come a time that day when a decision was made to take you to a Government hospital under your status as a veteran?

A Yes.

Q And where were you taken?

A To St. Alban's Naval Hospital.

Q That would be for Naval or Marine personnel; is that correct?

A Military personnel.

Q How did you get there?

A Ambulance.

Q When you got there, it was still the same day of the accident: Correct?

A Yes.

Q Just briefly tell us what was done the first day with you?

A I was taken into the operating room and I don't remember anything after that.

Q You were put to sleep?

A Yes, I was put to sleep, out of the ORY.

Q Were you given an understanding that the bones

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were set--

MR. KELNER: I am leading here unless there is objection.

Q That the bones were set and that a metal pin was put into some of the broken bones to hold them together?

A Yes.

Q And is it a fact that when you awoke, you had a long leg cast on the leg, the right leg?

A Yes.

Q Running from where to where?

A From my groin to my toes.

Q Ok.

And essentially, was that the main or really only injury you had, that is to the right leg?

A That was the only serious injury I had.

Q All the rest of the things that you had if anything, that you had they have long since gone; is that correct?

A Yes.

Q So far as after affects are concerned?

A Yes.

(continued next page)

MP/tk

Lennon - direct

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2aml

Q Well, this was June 9, 1972.

I would lead here on dates, if I may?

(Pause.)

MR. KELNER: Counsel brings to my attention that you woke up on June 10th, the next day.

A Yes.

Q Is it a fact that you were in the hospital from June 9, 1972 to a date in September?

A Yes.

Q And then, is it a fact you were permitted to leave the hospital for some days for perhaps about a week?

A It was a week.

Q You went home, is that correct?

A Yes.

Q Briefly during that period of hospitalization in June to September, briefly, just describe what went on with regard to taking care of your leg that you can recall.

A They would change casts, put me in traction, in a cradle I called it. My leg was suspended in air. I had a cast with a window, and the next time maybe half a cast. They cleaned it out with a scalpel and tweezers.

Q When you saw a window, will you tell his Honor what you remember as to the window?

A It was a square hole in the cast above the

Lennon - direct

42

wound in my leg and they ramived it every time.

Q In that square space would there be a plastic material put on it that was transparent to look through?

A A regular cast and they put a window, an opening where they saw.

Q Did that open space remain open or closed?

A It varied. Sometimes they left it closed, sometimes they didn't open it at all.

Q The cast would be changed from time to time?

A Yes.

Q Sometimes it was a short cast and sometimes longer?

A Yes.

Q Sometimes with a window and sometimes without?

A Yes.

Q Will you tell us what area of your leg was this window opened on, if there was a window?

A The center of the shin.

Q Would that be around midway between the knee and the ankle?

A Yes.

Q How large an area would that window be?

A About six inches.

Q In a square or rectangle?

Lennon - direct

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A A rectangle.

Q Narrowing from top to bottom?

A It was two inches wide by six or seven inches long.

Q During the time you were there, from June to September, do you recall what they would do with regard to that injured area?

A (No response.)

Q Tell me what you can recall.

A Soak it and look at it and doctors would come around cleaning it out.

Q With what?

A Tweezers and a scalpel, you know, hacking.

Q What do you mean by hacking?

A They picked up anything they thought was dead --

Q What?

A Skin inside the hole. I don't know what they were doing. I was biting something.

Q Biting something?

A Yes.

Q What were you biting?

A A doll.

Q Why?

A The doctor used to hand me a doll to bite on

Lennon - direct

because I kept breaking tongue depressers.

Q Why?

A Because they were sticking a knife in my leg.

Q Were you given pain-killing drugs?

A Yes.

Q Did you learn the word "debridement"?

A Yes.

Q What was your understanding of that term?

A Hacking. That was the hacking.

Q Who used the word "hacking," the doctors or patients?

A I think everybody.

Q That would be debridement, that would be cutting away dead skin?

A Dead tissue.

Q Did you at any time since you have been injured learn the meaning of irrigation and suction?

A I know what it means now.

Q Not then?

A No.

Q What did those terms mean as you came to know it?

A In antibiotic solution, going into something to clean it out and being sucked out by a gumbo. Two big balts.

Q Antibiotic solution would be placed where?

Lennon - direct

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A No.

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Q Antibiotic solution would be placed where?

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Lennon - direct

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A On a pole so it could drip in.

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Q Hanging on a pole?

4

A Next to the bed.

5

Q This would drip through what?

6

A Tubes to my leg. They were in my leg. And

7

stitched inside the leg.

8

Q This liquid antibiotic would be coming from the

9

bottle through the tube into the wound?

10

A Yes.

11

Q Where would it be?

12

A Into this bottle, they kept putting it.

13

Q In other words, it would bathe the wound and

14

come out into a bottle?

15

A I believe there was a suction hose. One would

16

go in and one would take it out -- the garbage.

17

Q Did you learn whether or not there was like a

18

pump to suck it out and get rid of it in a container?

19

A Yes, that is the gumbo.

20

Q You learned -- is this what they called an

21

irrigation and suction method or technique?

22

A I didn't know it was called a technique.

23

Q Did you by any chance have any medical training

24

in your life?

25

A No.

Lennon - direct

46

Q Did you ever have any training in the medical corps perhaps in military service?

A No.

Q Have you ever, other than layman's language, ever get any special instructions anywhere in your life concerning medical procedures, medical terms, and what is proper treatment of anything?

A No.

Q Never?

A None.

Q During this first hospitalization, from June to September, was any irrigation and suction method such as you described, during that three-month period, was that ever done to this wound?

A No.

Q When you went home, I think roughly about a week in September, is that correct?

A Yes.

Q How did you feel with regard to your leg at that time?

A Okay. It felt good to be up.

Q Did you have any pain or any particular problems?

A There was pain, always pain.

Q Were you given any medicine, pills or anything

Lennon - direct

for pain?

A Yes, medication to take home.

Q Did you take it?

A Yes.

Q Why did you have to take that? What were you feeling?

A My leg was broken.

Q Yes?

A I hadn't healed yet.

Q This is three months after it had been broken; were you still in pain?

A Yes.

Q Did you ever look at the area of the leg where they cut the window cast? Did you ever see it?

A Yes. I cleaned it at home.

Q Who told you to clean it?

A The doctors, the nurses.

Q What did they tell you to do?

A They did it three times a day in the hospital. They cleaned it with a Q-tip and the gauze and hydrogen peroxide and sometimes betadine.

Q In the hospital, were you asked to do any cleaning of it yourself?

A I can't remember. I think I did but I am not

positive.

Q When you went home, were you given instructions on what you should do cleaning the wound?

A Yes, the gauze, peroxide, Q-tips.

Q What were you told to do?

A Clean it out two or three times, change the dressing.

Q Yourself?

A Yes.

Q Did you ever have training in doing that?

A No.

Q Did you ever do that in the hospital before you went home for that week?

A Yes, they showed me how to do it.

Q At the hospital?

A Yes.

Q Was that when you were leaving the hospital or during the whole three-months period?

A I don't recall. I wasn't doing it at the beginning.. I don't recall.

Q After the week, did you go back to the same hospital, St. Albans Naval Hospital?

A Yes.

Q Why had you gone home for the week and why had

1
2 you gone back?

3 A I believe it was to walk on the leg, put
4 pressure on the leg.

5 Q When you came back into the hospital, did you
6 stay there until December 29th?

7 A Yes.

8 Q 1972?

9 A Yes.

10 Q December 29, 1972, is that correct?

11 A Yes.

12 Q You were there from -- counsel will agree, if
13 I am wrong, correct me, the second hospitalization, October 21st
14 -- I'm sorry, that is wrong -- was from October 24, 1972 to
15 December 29, 1972.

16 There is some discrepancy on a few dates.
17 Did you remain until December 29, 1972?

18 A Yes, I did.

19 Q During that time, at any time do you remember
20 whether or not anybody told you anything at all that made you
21 alarmed about the fact that you were not getting the right
22 treatment?

23 A No.

24 Q Did you have any reason at any time to feel that
25 any act of improper treatment or malpractice had been committed

upon you?

A Then? No.

Q Did there come a time after June 9th when you were injured that there was a finding of pus oozing from this wound?

A Yes.

Q About how long after you were injured were you informed or did you learn that there was an oozing of pus from the wound?

A I think it was about a month.

Q Was there ever a description or statement to the effect by the hospital people, the doctors and nurses, that there is an infection there?

A I remember them saying that, yes.

Q At that time, about a month after you were injured, aside from Q-tips, peroxide, and changing of cast and debridement, cutting away of any dead skin, do you remember anything else being done other than you getting drugs for pain?

A One surgery in July.

Q Tell us what happened in July.

And will counsel agree that operation in July was on July 28, 1972?

MR. RUDOFISKY: Yes.

MR. KELNER: that would be roughly about seven

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Lennon - direct

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1 weeks after the injury of June 9th.

2 MR. RODUFSKY: Yes.

3 Q What were you feeling and what were you thinking
4 with regard to this open wound on your leg at that time?

5 A They explained they were going to take the skin
6 off my left thigh and put it on the wound to my right shin.

7 MR. RUDOFISKY: Objection. The answer is not
8 responsive --

9 MR. KELNER: I will consent to striking it.

10 Q What were you feeling by the end of July,
11 around July 28th, with regard to your leg?

12 A That it was healing.

13 Q What?

14 A I was going to get out pretty soon.

15 Q Did you remember looking at the wound on or
16 about that time?

17 A Yes.

18 Q What did you see?

19 A There was a hole.

20 Q What do you mean by a hole?

21 A A hole. There was a hole in my leg.

22 Q Can you describe it?

23 A A big cavern about four inches long. Inside I
24 remember a hole about -- I don't know how big -- as small as a
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Lennon - direct

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dime. That was the hole we put the Q-tips in.

Q Did you notice whether there was any cozing or
pus in that area at that time?

A Yes, that is what we were cleaning out.

(continued next page)

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Lennon -direct/Kelner

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Q At that time, I think you already told me there was no irrigation or suction going into that area, is that what you told us?

A Yes.

Q Was that a cause of pain to you?

A Yes, quite a bit.

Q Do you know what kind of drugs you were being given for the pain at that time?

A I can't say definitely. I think I do but I am not sure.

Q Then I won't ask.

Was it pills or injections?

A Shots. Needles.

Q Where?

A My arms and backside.

Q In the buttocks?

A Yes.

Q In July, July 28, 1972, were you told what this operation would consist of? What they were going to do?

A That they were going to take the skin from my thigh and close the hole.

Q Were you put to sleep when that was done?

A Yes.

Lennon-direct/Kelner

Q When you woke up, I ask you what if anything you saw at any time in that particular area?

A It looked like a mesh of skin over the hole, over the wound.

Q To your observation they covered up that entire hole?

A Yes, inside the crevice and alongside. It was supposed to close it up.

Q This was put over that open wound, the skin from your hip, is that correct?

A Yes.

Q Well, describe what happened after that operation was done? How did you feel? What did they do with you?

A A lot of pain, it still hurt. And they would soak the graft site -- no, the hole in my leg.

Q Was this covered up with skin?

A It was meshed. It wasn't a solid piece of skin. You could still see through it. My memory is not that great about it.

Q Did that skin gravitate? Did it heal up completely?

A As far as I know, no. They were talking about parts healing and parts adhering and --

1

Q Adhering to what?

2

A To my leg, the parts that were scarred.

3

4

Q Who was the doctor who had talked to you about doing this skin graft?

5

A Dr. Nevaiser.

6

7

Q N-e-v-a-i-s-e-r, correct?

8

A I believe so.

9

10

Q Is he also, to the best of your knowledge, the one who actually did the skin graft operation?

11

A As far as I know.

12

13

Q Had you ever known him before you came to the hospital?

14

A No.

15

16

Q Was he on their staff to the best of your knowledge?

17

A Yes.

18

Q He was on the staff?

19

A Assistant chief of orthopedic surgery.

20

Q At St. Albans Naval Hospital?

21

A Yes.

22

23

Q After this operation was performed, you stayed there up to December except for that one week or so when you went home and came back, is that correct?

24

A Yes.

25

Q Up to December of 1972, did this wound ever

Lennon-direct/Kelner

completely close up based on your own observation or memory,
or did it remain open and draining?

A It was open.

Q Did there come a time in December when you
went through another operation?

A Yes.

MR. KELNER: Will counsel concede the record
shows -- and we will offer it in evidence later,
your Honor -- that that next operation, which would
be the third operation, was December 13, 1972?

MR. RUDOFISKY: Yes.

THE COURT: December what?

MR. KELNER: December 13, 1972.

THE COURT: All right.

Q Did anyone talk to you about the purpose of
this next operation?

A Yes.

Q Who?

A I believe Dr. Nevaizer and they all did.

Q What was said to you concerning the need
for another --

A They had to take the rod out. They had a
big long rod holding my leg together.

Q Were you told that there was an infection

5 1

2 that had been there for some length of time in your leg?

3 A Yes.

4 Q Did you ask the cause or why your leg was
5 infected for so many months?

6 A No.

7 Q What was told to you if anything concerning
8 the cause?

9 A Broken bones are susceptible to infection, open
10 wounds.

11 Q Did that alarm you to the point you felt they
12 were not handling you correctly?

13 A No.

14 Q Did you trust them?

15 A Sure.

16 Q Did there come a time when you were
17 discharged on December 29 -- withdrawn.

18 During that hospitalization, which ended on
19 December 29, 1972, were you given any irrigation and
20 suction treatments such as you described earlier with the
21 tube and the pump, during that hospitalization?

22 A They put it in near Christmas, in December
23 when they took out the rod.

24 Q That is after the operation of December 13,
25 1972, is that correct?

Lennon-direct/Kelner

A 80

A I believe it was during.

Q When you woke up from that operation, was that the first time ever that you had had this irrigation and suction equipment and procedure being done on your injured leg?

A As far as I know. The first time I saw it.

Q Did you ask anybody what is that being done for?

A Yes. They called it Mobil detergent gasoline.

Q You --

A Supposed to clean it out.

Q That is a colloquialism?

A The patients used it amongst ourselves.

Q Mobil detergent gasoline?

A Yes, to clean it out.

Q Were the hoses going in and coming out?

A Yes.

Q How long was that, what I'm calling irrigation and suction method, not Mobil detergent gasoline, how long did you have that procedure installed and running in your leg?

A Two weeks.

Q When you left the hospital you no longer of

course were getting that, is that correct?

A No, they pulled them out the day after Christmas.

Q When you were discharged, December 29, 1972, where did you go?

A I went to my brother's house.

Q Where was that?

A Flatbush Avenue in Brooklyn.

Q In Brooklyn?

A Yes.

Q After that, where did you go?

A Up to my mother's house.

Q Were you walking around at that time?

A Yes.

Q On both legs?

A Yes. They had me on a short cast.

Dr. Nevaizer told me to keep putting weight on it, to get fresh blood down there.

Q Did you use crutches or a cane?

A Yes, at different times.

Q At all times did you use something?

A I used crutches.

Q But you were asked by the doctor to put weight on it to get more blood circulation?

Lennon-direct/Kelner

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A Yes.

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Q Did you leave your brother's house and go to your parents' home?

5

A Yes.

6

Q Where is that?

7

A Upstate New York.

8

Q When was that?

9

A In the spring. I don't remember the date.

10

11

Q When you went to your parents, where did they live?

12

A Pine Plains, New York.

13

Q Is that near Poughkeepsie?

14

A 28 miles north of Poughkeepsie.

15

16

Q Your mother and dad live up there and some of your brothers and sisters?

17

A Yes.

18

Q What did you do when you went up there?

19

20

A Stayed at my mother's house convalescing. That's what I was told to do.

21

22

Q Were you told to do anything with regard to the wound?

23

24

A Continue to clean it out, clean my bandage and gauze with hydrogen peroxide or Q-tips.

25

Q Was it still draining?

Lennon-direct/Kelner

A 83

A Yes.

Q How much of an area was draining?

A it would fluctuate, from a dime to smaller -- up and down. The hole got smaller at one point. But it never closed.

Q Did there come a time -- by the way, did your mother do anything to help you?

A She would assist me.

Q Did there come a time when something brought you back to any hospital?

THE COURT: We'll take a short recess at this time.

(A recess taken at this time.)

(continued next page)

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Lennon-Kelner

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Q Mr. Lennon, you had told us that you went up to your parents to be with your parents during convalescence in Pine Plains?

A Yes.

Q I think you said you were up there until May of 1973, is that correct?

A Yes.

Q During that period --

I am just back tracking to get you back on the track-- your mother was helping you doing whatever the doctors told you to do about trying to keep the wound clean?

A Yes.

Q What happened after you were at your parents home, did you go to another hospital?

A Yes.

Q Where?

A Castle Point Veterans Hospital.

Q What brought you up to Castle Point Veterans Hospital?

A During one of the dressing changes my mother and I noticed there was a dark area above the wound, the hole. It was like a black and blue mark.

That night it prevented me from sleeping.

Q Why?

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A The pain.

3

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In the middle of the night it opened up and started
losing pus.

5

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Q As a result of that development, did you go
to the Veterans Hospital at Castle Point?

7

A Yes.

8

Q How did you get there?

9

A I think my mother drove me.

10

11

Q Is it a fact that you were at Castle Point
Veterans Hospital from May 3rd, 1973 to January 11, 1974?

12

A Yes.

13

Q That is roughly about seven months?

14

A Yes.

15

16

Q Just tell us what was done with you and I don't
want you to go through all of the details, what is your memory
of what was going on as to handling and treating you at
that time?

19

20

A Doctors at Castle Point decided they wanted to
do a saucerization.

21

Q Would that be cutting into the bone?

22

A To my knowledge.

23

Q In the area of where the wound or drainage was?

24

A Yes. Cleaning out the hole, all the bad meat.

25

Q At any time were you informed by them that your

1
2 bone by now had become infected or a condition called osteo-
3 myelitis?

4 A Yes.

5 Q Do you remember the month you were told of
6 all that?

7 A No.

8 Q Is it a fact that you did have an operation called
9 a saucerization operation on June 12, 1973, where some of
10 the dead tissue and bone was cut out in a saucer shape, as
11 explained to you? I am not making a doctor out of you but
12 --

13 A Yes.

14 Q At that time do you remember whether or not
15 while still in the hospital -- that was the fourth operation--
16 a fifth operation was performed in September 1973 called a
17 second saucerization?

18 A Yes.

19 Q During all this time, do you remember at any
20 time that they gave you this irrigation and suction procedure
21 you described earlier? Only if you remember?

22 A I don't think that they did that in Castle
23 Point.

24 Q Did there come a time when something happened
25 with you when you were taking a shower?

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A It was after I was taking a shower.

3

Q In the hospital?

4

A Yes.

5

Q Was this in July, 73 while still in the
6 hospital?

7

A Yes.

8

Q What happened at that time?

9

A It was a Friday afternoon. I was given
10 permission to take a shower. Upon putting on my pajama top
11 I felt my leg give -- the shin felt like it gave way.

12

Q Did you hear anything at that time?

13

A I heard a crack.

14

MR. RUDOFISKY: We shouldn't have leading at
15 this point, your Honor.

16

THE COURT: Yes.

17

Q What observations did you have, what feelings
18 did you have at that time?

19

A I thought automatically my leg broke again.
20 I got back in the wheel chair.

21

Q What did you feel at that instant?

22

A Pain.

23

Q What did you do about that?

24

A I was shaking. I was sweating.

25

I went out to the nurse's station and told the nurse on duty

1 something happened, "I might have broken it."

2 Q Did you fall down before you felt it was broken
3 or were you standing? What was your position?

4 A I was standing in front -- we didn't stand
5 away from the wheel chair, we locked it and put on our pajamas
6 (indicating). I grabbed the railing on the wheel chair.

7 Q Were you permitted by the doctors and the nurses
8 to go into the showers and get up from the wheel chair?

9 A Yes.

10 Q When you told the nurse what happened, what was
11 done with you?

12 A She told me to get in bed and she would send a
13 doctor.

14 Q Briefly, what happened on that incident?

15 A They took portable x-rays. They bring a machine
16 to your bed. They took x-rays and told me there was nothing
17 wrong with my leg, it was not broken.

18 Q What happened after that?

19 A They continued to say it wasn't broken, for
20 two and a half weeks.

21 Q What happened?

22 A A surgeon came in and told them it was broken.

23 Q Who is that surgeon?

24 A Dr. Cheong.

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Q Cheong?

A I believe so.

Q Chinese or oriental?

A An oriental doctor.

Q But he said that it was fractured?

A He said, "Don't let anybody tell you it's not broken, it's your leg. It is broken."
He put it in a cast.

Q Was your leg in a cast up until the time this happened?

A It varied, they would put it in and take it out.

Q Now, did there come a time when you left --
by the way, did there come a time when they removed the cast from your leg after they found it was fractured at that time?

A (No response.)

Q Or did you continue to wear the cast when you left the hospital?

A I can't state exactly.

Q There have been many, many casts changes during the last four years or so, is that correct?

A Yes, quite a few.

Q When you left Castle Point, I think in January, January 11th, 1974, did there come a time when you were permitted to take a trip anywhere?

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A Yes.

Q Who gave you permission to go?

A Dr. Kim.

A doctor in charge of the ward.

Q Kim?

A Yes.

Q Where did you go?

A Florida.

Q Was that permissible from a medical standpoint,
according to what you told me?

A I specifically asked permission.

Q Did they give you any instructions as far as
your leg was concerned?

A Just clean the wound again and I had a small cast
on with a window.

Q With what did you clean it?

A The gauze, hydrogen peroxide.

Q This takes us into January, the winter of
1974, is that correct?

A Yes.

Q How did you get to Florida?

A By car.

Q How did you ride in the car?

A My brother and a friend drove me.

1

2

Q Where did you sit?

3

A In the back seat.

4

Q With the cast on the leg?

5

A Yes. I kept it raised.

6

Q On what?

7

A The front seat.

8

Q Did any accident or anything happen on the way

9

down?

10

A No.

11

Q When you got to Florida, it was sunny and warm,

12

I take it, as compared with New York weather, right, Bob?

13

A Yes.

14

Q How did you spend your time in Florida?

15

A Went to the beach. They let me lay there.

16

Q Did that feel good in general?

17

A Yes, lying on the beach.

18

Q The doctor said that would be an advisably good

19

change?

20

A Yes, I asked specifically.

21

Q Did anything happen which occasioned a visit

22

to the hospital or doctor in Florida?

23

A The drainage out of the hole wet the cast and

24

it broke, as it did quite a few times before. I had to go to

25

the hospital.

1

2

Q Which hospital?

3

A I tried a private hospital, but they wouldn't

4

handle me. They told me to go to the Miami V.A. Hospital.

5

Q What happened there?

6

A They kept me over there.

7

They took x-rays and checked my leg and took off the

8

cast.

9

Q Did they put on another cast?

10

A No, they just bandaged up the hole.

11

Q Did you see the hole at that time?

12

A Yes.

13

Q What did you see?

14

A Just a big hole. I was always looking in.

15

Q Could you see the bone?

16

A Yes.

17

Q It was still draining?

18

A Yes.

19

Q After your stay in Florida, did you return

20

to the hospital? I think the date is April 10th, 1974, and

21

you remained there until May 1st, 74.

22

A Yes.

23

Q Just briefly, what was your condition as you

24

felt it and as you saw it?

25

A They were taking the cast off. I still didn't

1
2 feel I could walk on it. I didn't want to let go of the
3 crutches because it already broke once. I walked with
4 crutches.

5 Q What treatment was given to you?

6 A When I went into the hospital?

7 Q That is your second stay at the Veteran's
8 Administration Hospital in Castle Point, New York?

9 A Yes.

10 Q What treatment did they give you there?

11 A I think this time they just cleaned out the hole
12 and stuffing it with yellow gauze.

13 Q Was it getting better or worse--getting--

14 A Getting worse.

15 Q In what respect was it worse?

16 A The pain and it opened up. It started to close
17 and it opened up.

18 Q What would open up?

19 A The hole started getting bigger and ooze and
20 smell.

21 Q At any time did anyone say to you or indicate
22 to you anything to the effect that your case had been neglected
23 or not promptly treated at any time from the time you first
24 injured your leg in June of 1972?

25 A No.

MR. RUDOFSKY: I am going to object to any hearsay. The question calls for hearsay. It may be an admission against interest here but --

MR. KELNER: Before your Honor rules, may I simply say the answer I expect to receive about having discussed it is nobody told him any such thing.

THE COURT: That relieves it.

MR. KELNER: Would you please read the last question?

(Whereupon the last question and answer were read by the court reporter.)

MR. KELNER: Oh, the question was answered.

All I heard was the objection.

Q Your answer is nobody?

A Nobody.

Q By May 1, 1974, did there come a time when you were sent by ambulance back to the Brooklyn Veteran's Administration Hospital from Castle Point?

A Yes.

Q What was the ^{status?} saddest of your treatment at that time that prompted your removal back to the Brooklyn Veteran's Administration Hospital?

A They told me I had chronic osteomyelitis and it would not heal and I might eventually have to lose the leg.

(continued next page)

MP/tk

Lennon - direct

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Q Could you explain to the Court why under those circumstances you would be sent to Brooklyn Veterans Administration Hospital?

A There was a psychologist I spoke to.

Q Who?

A Mrs. Leob.

Q L-e-o-b?

A I believe that is the name. She was talking about I might have to lose the leg and I have to think about it.

Q Is she the one that broke that news to you?

A She brought it to my attention and told me I should think about it.

Q Think about the possibility of losing your leg?

A Yes.

Q That was up at Castle Point?

A Yes.

Q Only if you know, why did she send you back to the Veterans Administration Hospital?

A They said they weren't equipped and I should go either to Albany or Brooklyn. But Mrs. Loeb had a brother or brother-in-law working in the medical field in Brooklyn and happened to know that Smith.

MR. KELNER: May the record indicate the witness is pointing to Dr. Smith, who is seated in the

1
2 courtroom at the defendant's counsel table.

3 Q Were you told anything as to why Mrs. Loeb, a
4 psychologist, was the one to talk to you about amputation?

5 A I didn't want to accept it.

6 Q You're not listening.

7 Why was she the one rather than one of the
8 medical doctors or orthopedic surgeons the one to talk to you
9 about the possibility of amputation, do you know?

10 A No, I don't. I can't say.

11 Q Did you discuss the amputation question with
12 other doctors at Castle Point?

13 A Yes.

14 Q Do you remember to whom?

15 A It was Dr. Kim.

16 Q What did he say about it, only if you remember?

17 A I don't remember.

18 Q You said earlier you did not want to accept
19 that possibility of losing your leg, right?

20 A Right.

21 Q Well, when you went back to Brooklyn Veterans
22 Administration Hospital, was that the subject of a medical
23 decision on your part --

24 A It was discussed what hospital has the better
25 facilities for helping my leg.

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Q Helping your leg?

A Yes.

Q Not for taking it off?

A Yes.

Q Was it your decision to go back to Brooklyn Veterans Administration Hospital based on the feeling or discussion that they had greater facilities to help your leg?

A And the doctors would be better.

Q And that the doctors would be better there?

A Yes.

Q How did you get from upstate, Castle Point Hospital, to the Brooklyn Veterans Administration Hospital?

A Ambulance.

Q When you came there, that was I believe May 1, 1974, to July 22, 1974, during that time what was done with your leg?

A They did another surgery.

Q What was that operation? The highlights of it.

A Opened up my leg.

Q Who did it?

A I believe it was Dr. Smith, I am not positive.

Q Was there any discussion between you and Dr. Smith before that operation was done?

A The doctors talk to you before every operation.

1
2
3 Q Do you remember the highlights of that operation
4 which is now the sixth operation?

5 A To the best of my recollection, just clean it out.

6 Q Was that done?

7 A Yes.

8 Q You were in the hospital July 22, 1974 to
9 October 21, 1974, from July to October, is that correct?

10 A Yes.

11 Q During that period, where did you stay?

12 A In Brooklyn, in my brother's house.

13 Q During that time, did you try to do something to
14 earn a living, to keep busy?

15 A Yes.

16 Q What did you do?

17 A I worked for Jacobson Boilers.

18 Q Jacobson Boilers?

19 A Yes.

20 Q That is a Brooklyn company?

21 A Yes.

22 Q What did you do for them?

23 A Boiler work, boiler maintenance.

24 Q Tell us how you did that.

25 A We used plastic overalls and I had a short cast
and I put the plastic coveralls on and go by the boiler and

1
2 fix whatever had to be done or clean it.

3 Q How did you know how to work on it?

4 A He taught me and I knew the electrical work.

5 Q Was there electrical work connected with that?

6 A Some, yes.

7 Q In connection with your injured leg, you say you
8 had plastic overalls on it?

9 A Yes.

10 Q While doing this work, did you have to stand
11 up all day?

12 A Move about a lot.

13 Q Did you use crutches at that time?

14 A One.

15 Q One?

16 A Yes.

17 Q In connection with that work, how long did you
18 do that work?

19 A A week. I tried it a couple of days a week.
20 If I could, I would go back Wednesday. If I couldn't do it
21 Thursday, I wouldn't go.

22 Q How did you get along?

23 A I don't understand.

24 Q How did you get along with your leg?

25 A It started to get worse.

2

Q In what way?

3

A It smelled and kept draining and the cast was soaked.

5

6

Q It smelled? I think that is the first time you mentioned that. Had it ever smelled in the past?

7

A Always.

8

Q Since when?

9

A From the short leg cast in St. Albans.

10

Q Back to '72 and '73?

11

A '72 and '73.

12

13

Q It had had this constant smell from that drainage area?

14

A Yes.

15

16

Q Well, how long did you try to do some work for Jacobson Boiler Company?

17

A A few weeks. I don't recall exactly.

18

Q And then what happened?

19

20

A The cast broke one day finally. Again the cast broke from the draining.

21

Q The stiff plaster cast would get wet and crack?

22

A Yes.

23

Q What did you do?

24

A I'd go to the hospital.

25

Q Back to the Brooklyn Veterans Administration

1
2
3 Hospital?

4 A Yes.

5 Q When you got there, is it a fact you went back
6 on October 21, 1974?

7 A Yes.

8 Q And you were there until December 18, 1974?

9 A Yes.

10 MR. KELNER: Those are the dates from the
11 record, your Honor.

12 THE COURT: Yes.

13 Q When you got back there, what happened then with
14 regard to discussion about the amputation?

15 A It was the only way to stop the chronic
16 osteomyelitis.

17 Q Who told you that?

18 A The doctors discussed it.

19 Q What doctors did you talk to?

20 A Dr. Smith and the other doctors on the ward.

21 Q Are you saying they said in substance the only
22 way to stop this osteomyelitis is to amputate?

23 A Chronic.

24 Q Did they use the words you had chronic
25 osteomyelitis?

A Yes.

Q How long before that had you been told you had osteomyelitis or chronic osteomyelitis?

A In St. Albans when they put me in isolation. I don't remember the date.

Q You had been at St. Albans hospital June 9, 1972, off and on, until December 29, 1972, that is the period that you are talking about?

A The latter part.

Q November 15, '72 to December 29th, during that period were you told you had osteomyelitis?

A They told me I had a staph infection and because the bone was broken it became osteomyelitis.

Q Is that what they told you?

A Yes.

THE COURT: Put on the record what the staph infection is.

MR. KELNER: The word "staph infection," that means staphlococcus.

THE COURT: Thank you.

Q Were you told the word "staph" means staphlococcic infection?

A Yes.

Q On this hospitalization, October 21, 1974 to December 18, 1974, when for the first time was the talk, the

1
2 discussion began about amputation?

3 A (No response.)

4 Q About when?

5 A This is in St. Albans.

6 Q The Brooklyn Veterans Administration Hospital
7 in Brooklyn, October 21, 1974 to December 18, 1974, was there
8 a continued discussion about amputation?

9 A Yes.

10 Q The fact is that your leg was amputated
11 according to the records, October 29, 1974; is that correct?

12 A Yes.

13 Q When this discussion was renewed before the
14 amputation, during that hospitalization, starting
15 October 21, 1974, did you accept it immediately, the decision
16 to amputate?

17 A No. I went upstate to talk to my family about it.

18 Q When you say your family, you mean your mother
19 and father?

20 A Yes.

21 Q Did they know anything about the possible
22 amputation up until then?

23 A No, they thought it was going to get better.

24 Q Well --

25 A It didn't.

1
2 Q What was the discussion? What was the situation
3 about discussion?

4 A They were pretty broken up. He didn't want to
5 hear it. It was hitting him pretty hard.

6 My mother was pretty good about it. She was
7 helping me all along.

8 Q She helped you face up to the situation?

9 A Yes.

10 Q Your mother?

11 A Yes.

12 Q Your father didn't?

13 A He was pretty hard, he is a hard guy and doesn't
14 want to look at things when something is wrong. He didn't
15 want to see me lose my leg.

16 Q How did you react to the decision?

17 A It was never really definite. I couldn't say
18 at that time.

19 Q Did you decide immediately after you went up
20 there?

21 A No.

22 Q Why not?

23 A I didn't want to lose my leg.

24 Q When finally did you make the decision to agree
25 to it?

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3 A It was that last time when the cast cracked. I
4 was fed up with eating pain-killers and sleeping pills.

5 Q Okay.

6 There came a time -- you want to take a rest?

7 A Could I have some water?

8 THE COURT: Would you want to recess for a
9 moment?

10 MR. KELNER: I think we can continue.

11 THE COURT: Can you make it ten more minutes?

12 MR. KELNER: He's all right, Judge.

13 THE COURT: I know.

14 Q Who was the last doctor you spoke to concerning
15 the amputation?

16 A (No response.)

17 Q Before it was done?

18 A Dr. Smith. It was to be done in a group.

19 Q In a group of doctors?

20 A Yes.

21 Q After the leg was amputated, on October 29, 1974,
22 according to the record, you stayed in the hospital until
23 December 18th, is that correct?

24 A Yes.

25 (continued next page)

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3 Q Was anything stated to you, Mr. Lennon, concern-
4 ing what choices you would have or what would happen if you
5 didn't have your leg removed?

6 A Yes.

7 Q What?

8 A Osteomyelitis could spread, it could go above
9 the knee.

10 Q I'm sorry, I didn't hear you.

11 A It could go above the knee.

12 Q Yes?

13 A And we were in conversation about many
14 amputations, I knew, I saw a lot of guys getting around with
15 amputations below the knee, I didn't want it to go above the
16 knee or let it keep going.

17 Q Was anything explained to you that if you used
18 your leg it would be better below the knee, at least you would
19 be keeping the knee joint and could use it with an artificial
20 leg?

21 A That is it, exactly.

22 Q Right. Was that one of the factors that led to
23 your agreement?

24 A Yes.

25 Q Well, after the operation was performed and your
leg was amputated, how far below the knee was it?

1
2
3 A I think it is four and a half, five inches
4 below the knee.

5 Q You have heard that dimension or that measurement
6 expressed by doctors; have you not?

7 A Yes.

8 Q About four and a half, five inches below the knee?

9 A Yes.

10 Q All right. Now, I don't want to dwell on all
11 the details, but after your leg was amputated, can you
12 remember what physical sensation you had, what did you feel?

13 A Well, the first, after the surgery, was pain,
14 a lot of pain.

15 Q Yes?

16 A Then the phantom, we call them phantom pains.

17 Q What do you mean by phantom?

18 A It's -- the foot isn't there but you can feel
19 it hurt or you can feel it being itchy, you get pins and
20 needles.

21 Q Where, in the amputated leg?

22 A In the ankle and the foot.

23 Q But the foot is not there anymore?

24 A That is why we call them phantom pains, it can
25 get annoying in the night.

Q First, I'm trying to understand, are you talking

about pain in the foot even though the foot isn't there?

A Real pain, yes, pain.

Q Where do you feel that?

A On the foot, it is just like you stepped on a splinter, but the foot is not there.

Q But there is nothing to rub, is that what you are saying?

A Yes.

Q What about the itching?

A That is part of the phantom pain, it feels like an itch, at another time it is just pins and needles or an electric shock, it feels like you are getting electric shock from your foot.

Q In the missing foot?

A Yes.

Q And on your other foot, if you have an itch in your good foot, on your left one, you have an itch, you could scratch it?

A Yes.

Q What did you do to alleviate, to improve your feeling if you couldn't scratch the missing foot?

A You can try to rub the stump, massage it, soak it.

Q Who told you to do that?

A The doctors tell you to soak it.

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3 Q They said that the only thing you can do is soak
4 it?

5 A Yes.

6 Q Is that right?

7 A Yes.

8 Q I'm going to bring you all the way up to the
9 present time on just this one point:

10 Have those phantom sensations of pain and so
11 forth ever left you or do you still feel them?

12 A I have it right now.

13 Q When do you get those sensations, in the daytime,
14 nighttime, anytime?

15 A Well, a lot, most of the times at night when you
16 are not thinking about too much, when you don't have too much
17 on your mind.

18 Q Yes?

19 What happens about that?

20 A You have to get up and soak it.

21 Q At night?

22 A Sure.

23 Q Do you ever sleep through a whole night?

24 A Once in a while, most of the times I have to
25 soak it.

Q Most of the time you have to what?

1 A I have to soak it, get up and soak it.

2 Q What do you do when you get up at night?

3 A First thing I try to do is to see if there is
4 anything on television.

5 Q You turn on the television in your bedroom?

6 A Yes, and I start running the water.

7 Q You mean you are going to sit there?

8 A I have to sit there to soak the stump.

9 Q Yes?

10 A You don't do it on the bed, you don't stare at
11 the wall.

12 Q How do you get the water for it?

13 A I hop to the sink and I put it on the floor and
14 I move it.

15 Q Is there a sink in your bedroom?

16 A No.

17 Q Where?

18 A In the bathroom or the kitchen.

19 Q So you fill up the pan of water?

20 A I fill up a pan, some nights if it is too bad I
21 have to go into the bathtub, go right into the bathtub. If
22 there is a good enough movie I would sit in front of the
23 television, I would do it in front of the television.

24 Q Otherwise you sit alone in the bathroom?

1
2 A Yes.

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3 Q And you soak it?

4 A Yes.

5 Q How many nights a week do you do this?

6 A Approximately five.

7 Q Five?

8 A Yes, and I just use dermasarge and rub it in.

9 Q What is dermasarge.

10 A It is a lotion that they use in the hospital.

11 Q Was that given to you as something to try to use
12 to help that sensation, the phantom sensations and the pain?

13 A It was given to me just for the skin, to use to
14 condition the skin.

15 Q And you do this five nights a week when you can't
16 sleep, you are aroused out of your sleep out of the night
17 hours, or whatever time, minutes, whatever?

18 A Well, it takes about an hour and a half, two
19 hours.

20 Q And that is for five nights a week?

21 A Yes.

22 Q Do you have to get up more than one time in a
23 night?

24 A Yes, a few times it has happened.

25 Q Okay. Is that getting better or worse or

1
2 remaining the same, these phantom sensations?

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3 A They remain the same.

4 Q Now, coming back, when your leg was amputated,
5 what if anything was done to teach you or train you about
6 getting around on crutches or anything at all?

7 A I was given crutches and a leg to start walking
8 with.

9 Q An artificial leg?

10 A Yes.

11 Q How long did you use that particular one?

12 A A couple of weeks, I believe.

13 Q And what was it, just describe it to his Honor,
14 if you will, please.

15 A They call it a pylon, it is just a steel tube
16 that is put on the cast, the stump is in the cast and it hooks
17 on, and when you want to get out of bed, whenever you have to
18 get out of bed, if you want to walk, you hook this leg on,
19 just a pipe which fits into the bottom of the calf --

20 Yes?

21 A Because they put a metal part right on the
22 bottom of the calf when they do the amputation.

23 Q That was the first temporary device they gave
24 you; is that correct?

25 A Yes.

1
2 Q And did they show you how to do that, how to get
3 around a little bit with that?

4 A Yes.

5 Q By the way, the wound where the leg had been cut
6 off was still open and supposedly healing; is that correct?

7 A Yes, it was in the calf --

8 Q In the beginning, I am talking about.

9 A Yes.

10 Q How would you bear weight on that artificial
11 thing that you are talking about if it was still draining, it
12 was still open and still healing?

13 A Well, I believe the cast is made in such a way
14 that you put most of your weight on your knee, into your upper.

15 Q After you had used that a number of weeks, what
16 then was done?

17 A They took off the cast and removed the sutures.

18 Q The sutures where it had been sewed up?

19 A Yes.

20 Q Where the cut had been made?

21 A Yes.

22 Q Then what did they fit you with?

23 A Another temporary prosthesis.

24 Q That was the second one?

25 A The second leg.

1
2 Q How long did you use that one?

3 A A few more weeks, about a couple of months,
4 maybe.

5 Q Was there anything different from that one from
6 the first one as far as getting around was concerned?

7 A It was more like a leg, it had a pylon, the
8 same thing again, with adjustments for adjusting the shoes and
9 such, it was aluminum, this one was lighter.

10 Q What happened after you used that one a few weeks?

11 A They gave me another leg that looked like a leg.

12 Q Right.

13 Was this all something that they told you you
14 were going to go through about four of these things, was there
15 any need to keep changing?

16 A No specific number, well, they said that I was
17 having a problem with swelling and shrinking, swelling and
18 shrinking.

19 Q Of what?

20 A Of my stump, but that was supposed to go on
21 after a recent amputation.

22 They said it would go on a year or two.

23 Q A year or two until it would hopefully heal so
24 that you could have a more permanent artificial leg?

25 A Yes.

1 Q And a prosthesis it is called; right?

2 A Right.

3 Q How long did you use the second one until they
4 switched you to a third one?

5 A A couple of months.

6 Q What was the third one like?

7 A The third one was one that looked like a leg.

8 Q All right.

9 And how did that fit onto you?

10 A It fitted okay, at the beginning they kept on
11 shaving the inside, they cut me, put a hole in it --

12 Q Is that right?

13 A They had put a hole in the side so that when I
14 put my stump in I have to pull it in, actually, because every
15 time I put my stump in the skin would buckle up and wrinkle,
16 so I had a hole on the side to sort of straighten the thing out.

17 (continued next page)

Q Did the stump ever really heal up from then until the present time?

A No, it stayed open.

Q It stayed open?

A Drained.

Q Well, in the beginning when you had agreed to go through this operation was there anything said about how long this would take, how long it would take to heal until you could get around with an artificial leg and crutches?

A It was only supposed to be a couple of months.

Q It was only supposed to be a couple of months?

A I was under the impression that I would be walking around in a couple of months.

Q With the artificial leg?

A Yes.

Q All right.

Well, after that third one, did there come a time when you had a fourth artificial leg or prosthesis?

A Yes, it is the one that I have now.

Q That is the one you have now, okay.

And when did you have that last one fitted

2 1
2 out?

3 A It was about a year ago.

4 Q Where?

5 A At Amken Prosthetics.

6 Q Did there come a time when any problems arose
7 concerning this nonclosing of the stump area, anything
8 breaking out in that area or anything like that?

9 Did you go to any other hospital for any
10 other problem?

11 A Yes.

12 It wouldn't close from the Veterans
13 Administration Hospital so I went to another doctor.

14 Q Where?

15 A He was affiliated with the Caledonia Hospital
16 but I knew him from my mother.

17 Q That is not a Government hospital; is that
18 correct?

19 A No, right.

20 Q Did you go to the Caledonia Hospital?

21 A Yes.

22 Q And was that -- I think counsel may agree --
23 October 19, 1975 to November 6, 1975?

24 A Yes.

25 Q Your amputation having been done in the

previous year, on October 29, 1974; is that correct?

A Yes.

Q Now, from October 1974, from the amputation, you left that hospital after the amputation on December 18, 1974, from then until October 19, 1975 did you go anywhere for checkups or medical care on that stump?

A Yes, I was going to that doctor, a doctor who had done work for us before with my mother.

Q What is his name?

A Dr. Kaplow.

Q K-a-p-l-o-w?

A Yes.

Q Okay.

What if anything did he do?

A He was treating the stump and he was keeping in communication with AmKen and trying to figure out how to fit the leg properly so that it would close.

Q About how many times did you see him, roughly?

A A dozen.

Q A dozen times.

He was also trying to treat the stump and trying to figure out, trying to get a recommendation on the type of prosthesis on which you could do better; is

Lennon-direct/Kelner

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that correct?

A Yes.

Q Well finally, when you went to the Caledonia Hospital, what was the condition, and this is now a year after the amputation, what was the condition then in October 1975.

A It was open, quite open, about --

Q The stump?

A Yes, about an inch and a half.

Q What was happening in that stump area?

A I was told it was adhering.

Q Adhering?

What did that mean to you?

A He explained it with his hands, he held it this way (indicating fist), he said when you have an amputation, the stump, the skin is supposed to move freely but this was adhering where it was cut and it wouldn't move so it was splitting open.

Q It was splitting open?

A Yes.

Q Was there any drainage or leakage, was there any fluid there?

A Yes, quite a bit.

Q When you would put any weight on the

Lennon-direct/Kelner

artificial leg, and this stump area was open, just how would that affect it as you felt it?

A When it opened I couldn't put the leg on it, I couldn't put any weight on it, I couldn't even pull the leg, you have to put it on.

Q Why not?

A It would tear and open the leg more.

Q From bearing weight on it?

A I couldn't, I wouldn't have been able to get it on.

Q Why couldn't you get it on?

A For pain.

Q Swelling up?

A It would swell up because I couldn't wrap it, I am supposed to wrap it.

Q Wrap it with what?

A Ace bandages.

Q Who told you to do that?

A The doctors.

Q After the Brooklyn VA where they had amputated?

A Yes.

Q And when you couldn't wrap it, would you be able to put the prosthesis on anyway?

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A No, no, it would swell up.

3

Q Okay.

4

5

Now did you at the Caledonia Hospital --
well, what did they do for you there, you were in from
October 19 to November 6, 1975.

6

7

8

9

A He told me he had to clear it up, it was
infected or something, and he told me they had to clear it
up before they could do anything.

10

Q Who told you that?

11

A Dr. Kaplow.

12

13

Q He was the one who had brought you to the
Caledonia Hospital?

14

A He admitted me.

15

16

Q Was anything done with regard to that open
stump area?

17

18

A Constantly packing and bandages and medications
and stuff.

19

20

Q Now, coming up to the present time, how is
your stump area today, at this very moment, for example.

21

A Tender, very sore.

22

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24

MR. KELNER: I'm not going to ask the Court
to look at it today, your Honor, because I would
like --

25

THE COURT: No.

7 1
2 MR. KELNER: I would like you to see it, but,
3 with your Honor's permission when Dr. Cobon is here
4 I will request, and we will be talking about it at
5 that time, I will request that you view it then. I
6 think that will save double exposure because I would
7 want the doctor to point out certain things.

8 Is that permissible?

9 THE COURT: Yes.

10 All right. We will recess now for lunch.

11 MR. KELNER: Thank you, your Honor.

12 Your Honor, may we return at 2:30, I must go
13 to the State Supreme Court.

14 THE COURT: Yes, don't worry about that.

15 (At 1:00 p.m. a recess was taken.)
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(Afternoon Session)

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2:35 P.M.

THE COURT: All right, let us continue.

ROBERT A. LENNON, called as a witness on his own behalf, having been previously sworn, continued to testify as follows:

DIRECT EXAMINATION

BY MR. KELNER: (cont.)

Q This morning you had told us about these phantom sensations.

I would like to find out various other aspects now with regard to your leg.

Do you have pain at all now, and when I say now, I mean either this moment or today or any of these days?

A Yes, I do.

Q Tell us about what circumstances you are having pain.

A The worst pain is at the incision, they called it the last time I went to the prosthesis, they call it a virginal scar.

Q What is that?

A A virginal scar, that is what they call it.

Q Yes, a virginal scar from the word virgin, but what does that mean?

A As I said before, it is adhering to the bone, my

skin --

Q Yes.

A The bottom of the stump is coming up but the top isn't moving so it is ripping.

Q So it is ripping it?

A It is ripping it.

Q And where is it ripping it?

A It rips it open across.

Q Is that the area, is that a fissure, the opening called a virginal scar?

A Yes.

Q Okay.

And what is happening there at this moment, or from the time when it rips off?

A It is in the process now of opening up again, it closes for a couple of weeks and every two months it starts opening up again.

Q What makes it open up?

A That adhering and the prosthesis, I really don't know, medically.

Q Well, is there any connection between -- have you, have you noticed whether or not there is any connection between your weight bearing on the prosthesis and the opening up?

1
2
3 A Yes, if I put weight on the leg it would open
4 up.

5 Q And so when it opens up that's where it opens
6 up, at that place that is called the virginal scar?

7 A Yes.

8 Q What happens, what happens at that place, what
9 do you see and what do you feel there?

10 A I'm supposed to put wieght on it, I'm supposed to
11 put weight on it, but the more weight I put on it the more it
12 tears and opens and starts draining and I can't walk, the
13 pain, so I have to take the leg off.

14 Q Then it remains off, the artificial leg, for
15 how long, until you can try it again?

16 A Depending upon how open it gets, it got open
17 till when I went into Caledonia, it was about an inch and a
18 half wide.

19 Q At what stage is it today, for example?

20 A It is the beginning.

21 Q The beginning stage of opening?

22 A Right, the doctor has words for it but I don't
23 have the words.

24 Q How do you know it is in a beginning stage ,
25 based on past experience of opening and closing?

A The first sign is the pain, I can feel each step,

Lennon - direct

I feel a little more of a limp and when I take the leg off at night the red, and it starts opening, I can see it starts opening.

Q I notice today that you are wearing the artificial leg; is that correct?

A Yes.

Q Even now on the witness stand you are wearing it under your trousers; is that correct?

A Yes.

Q And when you are walking with the two crutches, which I noticed you had here today, are you putting some weight on your leg as you are moving along on crutches?

A I rest on it, I don't put -- I am putting some weight on it to keep it active, but not any weight, just keeping it moving.

Q I see. Now, by the way, with whom do you live now?

A Myself.

Q Why are you living by yourself now, your parents live upstate where they lived before; is that right?

A Yes.

Q They used to live in Brooklyn?

A Yes.

Q And then your dad was retired from the New York

Lennon - direct

City Police Department and got this job up there?

A Yes.

Q In Poughkipsee?

A Yes.

Q Why are you living here and they are living up there?

A The convenience, the medical facilities, I need a hospital and/or doctors close by.

Q And from that standpoint, have you been advised to stay in the New York area where you have access to a hospital or a doctors' facilities and treatment?

A To date it has been tentative that I am out of a hospital.

Q What do you mean by that?

A Well, now I am waiting for the leg to heal up so I can -- I have to go back in, I am told.

Q I beg your pardon?

A I have to go back into the hospital, as I have been told.

Q You have been told you may have to go back to a hospital for further surgery?

A Yes.

Q We will get that from the doctor.

How do you sleep at nights, in what position?

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Lennon - direct

A In a fetal position, on my right side.

Q What do you mean by that?

A Curved on my right side and I have to put cushions or blankets between my knees.

Q Why is that?

A If my left leg hits my right stump, it wakes me up.

Q And then with regard to getting up to bathe the stump that you told us about earlier, is that another -- withdrawn.

In other words, you have told us now about two causes of waking up, one of the bumping of the right leg against the left leg; is that correct?

A Yes.

Q And the other is the phantom pains that get you out of your sleep?

A Yes.

Q Okay.

Now, the pillows between your legs which are placed there to try to avoid the hitting of the legs, that is another reason for waking up; is that what you mean?

A Yes.

Q Now, are you still wrapping the stump in elastic bandages?

1
2 A Yes, I have to every night.

3 Q And why is that being done?

4 A I don't know the medical term, but what it is
5 doing is it swells, it swells and it blows all out of
6 proportion if I don't leave the bandage on.

7 Q Have you been advised by the doctors to do that?

8 A Yes.

9 Q Okay.

10 Let us assume that you are in the period where
11 it has more or less closed up, this open wound on the stump -

12 A Yes.

13 Q Can you then try to walk and put weight on it
14 without using the crutches for at least a short time?

15 A Yes.

16 Q How far were you able to walk at any time
17 without using the crutches, during those periods when it has
18 held up better?

19 A I have tried it around the block.

20 Q Yes.

21 A Never made it.

22 Q You never made it?

23 A No.

24 Q Why not?

25 A I have to use the crutches, or it will start
hurting, throbbing.

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Lennon-direct

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Q Can you tell us about your stability, your stability when you walk for any short distance?

A I don't try, the more I try it the more it hurts and --

Q Does that make it sore at all or does that have any affect?

A It stops me from walking, I can't walk on it when it starts paining.

Q I see.

Does it have any effect on you with regard to cold weather or changing weather or damp weather?

A Any inclement weather will cause it to start throbbing.

Q Right at the area of the amputation?

A Yes.

Q Does that have any affect on the phantom sensations that you described earlier?

A It is hard to distinguish, sometimes I don't know, I won't find out until the next day that it is raining when I thought it was a phantom and I found out it was the rain.

Q At my request or upon the recommendation of someone, did you go to see Dr. Leo Corvin within the last few months or so?

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A Yes, I did.

Q And by the way, where did you first learn his name, if you can remember, was it from me as your attorney or from somebody else or what do you recall?

A I have had quite a few conversations with people about doctors in hospitals and his name was mentioned.

Q Do you remember who mentioned it to you?

A No, I don't.

Q How did it come about that you then went to Dr. Corvin in particular?

A When I asked you at your office if you had heard -- if you would mind if I went to him, you know, if I could go to him.

Q After that, after my saying whatever I did, was it after that that you went to him?

A Yes.

Q But first you heard his name from some other source?

A Yes.

Q Okay.

You mention that, by the way, that this condition since the amputation, this open and draining condition -- well, I will ask you whether or not that has been a constant

1
2 thing, opening and closing, opening and closing, opening
3 and closing?

4 A Yes.

5 Q And is there any pattern that it takes in the
6 way of weeks or months or whatever between how long it is
7 open and how long it takes to heal and how long it closes
8 and then how soon it is opening again; is there any pattern
9 that it takes in time?

10 A It depends upon how I would try to move it,
11 about eight weeks, every eight weeks it would open up.

12 Q Every eight weeks it would open up?

13 A Yes, but then it would take a few weeks to
14 close up.

15 Q Now, since the amputation, it has been approx-
16 imately what, it has been every eight weeks it will open?

17 A If not sooner, yes.

18 Q And then when it opens, how long does it stay
19 open?

20 A It depends upon how open up it became, it
21 could take weeks, months.

22 Q And during that time, what do you do when it
23 is open, and now you are saying you are going into another
24 stage where it is going to be open?

25 A If it continues to open up I will have to

1
2 take off the leg and stay home.

3 Q Now, who gets your meals at home?

4 You are living alone, you said?

5 A Friends, relatives.

6 Q What?

7 A Friends, relatives.

8 Q Well, are you able to afford to eat out
9 every day in a restaurant?

10 A No.

11 Q Who does your shopping for you?

12 A Friends that I ask to help me.

13 Q Are these people young people like yourself
14 who knew you before you were injured?

15 A Yes.

16 Q And do you have any sisters or brothers, who
17 live anywhere nearby in Brooklyn?

18 A Yes.

19 Q How many?

20 A Two sisters.

21 Q And do they ever help out in maintaining you
22 at home?

23 A Yes

24 Q What do they do for you?

25 A They help get me groceries, small groceries

1
2 which I can't afford and they help me carry packages.

3 Q Do you go to buy yourself?

4 A Yes.

5 Q How do you get there?

6 A I will go in a car.

7 Q Whose car?

8 A Mine.

9 Q Do you go to buy yourself?

10 A Yes.

11 Q How do you get there?

12 A I will go in a car.

13 Q Whose car?

14 A Mine.

15 Q Have you bought a used car?

16 A A friend just gave me a car.

17 Q He gave you a car?

18 A Yes.

19 Q You didn't pay for it?

20 A No.

21 Q How old is it?

22 A Ten years old.

23 Q What kind of a car do you drive?

24 A It is a Chevrolet.

25 Q How do you drive it, how do you drive it

1
2 since you don't have the right leg?

3 A I can push on the pedal with my leg.

4 Q With your artificial leg?

5 A Yes.

6 Q What about the times when you aren't able,
7 when the wound is open, what about shopping?

8 A Then I ask people to do it.

9 Q Otherwise you get around with crutches as you
10 did today with your crutches?

11 A Yes. I don't shop then, I can't carry.

12 Q You don't do it by yourself?

13 A No.

14 Q How about cooking?

15 A I have frozen foods.

16 Q What?

17 A I eat a lot of frozen foods.

18 Q Does anybody ever come over and make a meal
19 for you, a hot cooked meal?

20 A Yes.

21 Q Who does that?

22 A Friends.

23 Q Your sister?

24 A My friends.

25 Q How about cleaning the house?

1
2 A They help that, too.

3 Q Since you lost your leg have you tried to
4 get any jobs anywhere?

5 A Yes.

6 Q Tell me about that, where have you worked
7 since you lost your leg, what have you tried to do, what
8 have you tried to get by way of earning some income?

9 A I remember when I first got out of the
10 hospital I tried a job at a gas station.

11 Q Where was that?

12 A Baltic Street and Third Avenue.

13 Q In Brooklyn?

14 A Yes.

15 Q What did you do in the gas station?

16 A Worked the pumps, it was an all-night job and
17 they needed somebody there at night.

18 Q So they wouldn't get robbed?

19 A Yes, they parked trucks in there all night.

20 Q What would you do there all night?

21 A I would take care of the dogs, two dogs, I
22 would feed them and I would pump gas if cars came in: they
23 kept the gas pumps open to pay for staying open all night.

24 Q What would you do, you would pump the gas?

25 A I would stay in the office and when the cars

came in I would have to pump the gas into the cars.

Q That would be all night long that you would be up like that?

A Yes, until about 7:00 in the morning, 6:00 o'clock, 7:00 in the morning.

Q What time would you go on duty?

A About 10:30, 11:00.

Q You would be there alone all night?

A Yes.

Q And how long did that continue, that job?

A A week, six days.

Q Six days?

A Yes.

Q What happened, how did you make out during those six days on that job?

A My leg opened up and put me back in bed.

Q Was there anything that you were doing that was causing your leg to open up, based on your feelings of what was happening to the leg?

A It was winter when I got out, it was snowing, and it was snowing and I trace it to the snow. I was using crutches, I didn't know why it was opening up.

Q Did you do any weight bearing during those six days?

1
2 A Some, just what I was told to do.

3 Q Okay.

4 And then after your leg opened up, what did you do
5 then, did you stay home right away?

6 A Yes, I had to go into bed.

7 Q How long did you have to stay in bed on that
8 occasion?

9 A I believe it was two weeks.

10 Q How much did you earn for that, working there
11 about six nights?

12 A I think it was \$162.00.

13 Q That was for the all night tour of work; is
14 that right?

15 A Yes.

16 Q Six nights, would it be?

17 A Yes.

18 Q Okay.

19 Well, after that did you try to get any job anywhere
20 else?

21 A Yes.

22 Q Where?

23 A I tried to sit in a job this time.

24 Q A sitting job?

25 A Yes.

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Q Where was that?

A In a car service.

Q What do you mean by a car service?

A I was driving a car service.

Q You mean like, unlicensed --

A Gypsy type cab.

Q A gypsy type cab?

A Yes.

Q And did they give you a job?

A Yes.

Q And how long did you do that?

A Four days.

Q What happened on that job?

A The leg opened up.

Q During those four days did you have to get in and out of the car to either help passengers or packages or things like that?

A Mostly it was for pushing on the gas throttle.

Q Pushing on the gas throttle?

A Yes.

Q What would be the affect on the stump of pushing on the gas peddle with the artificial leg?

A I would take it the same thing as pushing weight on it.

1
2 Q When you put your foot down on the gas pedal,
3 what if anything would you feel on the stump area?

4 A Pain.

5 Q Each time you would do it?

6 A Yes.

7 Q How would you stop the car or step on the
8 break?

9 A With my left foot.

10 Q Did you drive a car before you lost your leg?

11 A Yes.

12 Q At that time you had your right leg to step
13 on the break?

14 A Yes, my right leg, my right leg.

15 Q Well, after that job as a gypsy cab driver,
16 did you have to stay home for any length of time while it
17 was open?

18 A At that time it was about a month, I believe.

19 Q You had to stay a month?

20 A Yes.

21 Q Did you make any further efforts to ~~earn some~~
22 money?

23 A Well, each time the leg would start healing
24 I would start getting papers and start trying to find
25 something.

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Q Yes.

Where else did you get any jobs?

A I applied at the telephone company.

Q Yes, did you get a job there?

A Yes -- no, they were going to give me a
job.

(Continued on next page.)

1
2 Q What happened?

3 A Well, at the very end when I got the job they
4 said it could cause -- I might have, I might have an
5 accident or something while I was working for them and they
6 would be responsible for the rest of my life.

7 Q And did they take it back, the job, and not
8 give it to you?

9 A Yes.

10 Q In what office was that?

11 A Down here somewhere, Schermerhorn --
12 Livingston Street.

13 Q So they had hired you for a job and then
14 they retracted on it?

15 A They gave me a card, I had an I.D. card, the
16 whole thing, they told me to come in Monday morning, but
17 I had to see the doctor first and the doctor said, "I am
18 sorry."

19 Q That is the Telephone Company doctor?

20 A Yes.

21 Q And he rejected you for work?

22 A Yes.

23 Q For the reason that if you were to fall down
24 they would be responsible for you?

25 A Because of the leg, yes.

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Q All right.

Did you try anywhere else with regard to registering for employment opportunities through the State of New York, for example, did you ever try that?

A The unemployment service, yes.

Q The New York State Employment Service, I think it is.

A Yes.

Q Is that where you went?

A Yes, we call it unemployment.

Q What did you do with regard to trying to get work through the New York State Unemployment Service?

A Well, they put you in categories and they put me in a category of worker-mechanic type work but I couldn't do that so they didn't know what type of field to put me in so they couldn't find it.

Q Have you tried through them to get placed somehow doing something?

A Yes, but everything was physical, janitor, something like that.

Q Have you tried other places from time to time or made any other efforts, tell the Court what you have tried to do to get some income for yourself and to keep busy.

3 1
2 A Any paper I get, usually the Times every
3 Sunday, I would try, I have sent a couple of resumes to
4 people, I tried one as a chauffeur.

5 Q A chauffeur?

6 A Yes.

7 I didn't get any answer to it, though.

8 Q Right.

9 A And a couple of employment agencies that are
10 in the Times, in the News, I called them up but they say
11 they can't classify me.

12 Q When you would speak to them would you have
13 to tell them about the fact that you lost your leg?

14 A Eventually it led to this. They called me
15 and when they saw I was physically incapable they asked
16 me why, if it was from service overseas and if I was
17 physically handicapped.

18 Q When you told them, what was their reply to
19 that?

20 A They told me that not too many people wanted
21 to hire because they are afraid they would have to take
22 care of me for the rest of my life.

23 MR. RUDOFISKY: I would move to strike that
24 as hearsay.

25 THE COURT: It is kind of hearsay, yes.

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45

MR. KELNER: All right.

Q At the present time are you working anywhere?

A No.

Q When had you last earned anything on any kind of work, how long ago?

A It was September of last year.

Q September 1976?

A Yes.

Q Where was that?

A Mebco Industries.

Q What did you do there?

A I was an electrical dispatcher.

Q What does that mean?

A I dispatched mechanical personnel.

Q Yes?

A Specifically, electricians, refrigerator and air conditioning mechanics.

Q And did that require you to walk about and use physical abilities?

A I got up and down but it was a sitting down job, it was a desk job with a phone.

Q How long did you work there?

A Approximately four and a half, five months.

Q How much did you get paid?

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A I made \$150 the first three months, I think it was.

Q And why did that job end?

A At the time they wouldn't give me a reason, at the time they wouldn't give me a reason, but I suspected that it was because I would take a couple of days off.

Q Why?

A Because of my leg, I had to go to the doctor and such and I was using both crutches every day and people would get me coffee. I suspected it and they said that they needed somebody more responsible that can be there every day.

Q Is that what they said, they wanted somebody more responsible than you?

A That can be there every day.

Q Did you do your work responsibly when you were able to be there?

A Yes, when I was there.

Q All right.

Now I would just like to ask some questions about your personal life.

You told us before you were injured that you used to enjoy dancing.

A Yes.

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Lennon--direct/Kelner

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Q You used to go out on dates, you said.

A Yes.

Q Before you lost your leg?

A Yes.

Q How about since you lost your leg, what has your social life been like?

A I haven't been dancing in a long time.

Q Have you danced at all since you lost your leg?

A No.

Q How about dates?

A I have been out a couple of times.

Q What has happened, please speak your own mind, what happens about your social life when you make a date, first of all do you make a date at any time with a girl the first time you meet her and while you are having to use the crutches and when your wound is open?

A I don't usually ask anybody out when I am walking with the crutches, no.

Q Have you tried to make a date when your wound is more or less closed at a given time and you are not using the crutches?

A Yes.

Q And are you able to sometime meet a girl and

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Lennon-direct/Kelner

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make a date?

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A Yes.

4

Q And tell us what happens on such evenings.

5

A If I meet a girl at a discotheque or a bar or

6

anything like that, she asks me if I am going to dance or

7

if we can, and if I have to walk she sees me limping and

8

she always asks, "What is wrong?"

9

Q The girl would see you limp?

10

A Yes.

11

Q These girls are usually I assume in their

12

early twenties?

13

A Yes.

14

Q You are 25 now?

15

A Yes.

16

Q And if you go to meet the girl and most of

17

the fellows your age would be dancing with the girls like

18

at a discotheque --

19

A Exactly.

20

Q Or at a bar where they have some music or

21

something like that --

22

A Yes.

23

Q Then are you able to dance?

24

A No.

25

Q So when the girl asks whether you are limping

Lennon-direct/Kelner

or why aren't you dancing, what happens then?

A I have to tell them that I lost my leg and the whole conversation starts about how and how long was I in the hospital and that is what we talk about.

Q Can't you steer the conversation away from that?

A Sooner or later, something or other involves either hospitalization or dancing or something and the leg.

Q Let's assume you have on those occasions made a date with a girl and you have gone out with her on a given evening, have you called the same girl ever in the past, called her again to make a second date?

A On numerous occasions.

(continued next page)

4fhrLennon

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Q What had happened when you tried to date the girl again?

A They are usually busy.

Q What?

A They are usually busy.

Q Have you ever had a girl agree to make a second date with you after that first night when she found out that you lost your leg?

A One time, yes, it was to explain it, she felt funny being with me, I didn't have my leg on and it was the first time she had ever seen a guy without a leg.

Q Well, what did she do?

A Well, she didn't stay.

Q What do you mean by that?

A She just came over to explain it to me and then she went home.

Q I see.

How about athletics, things that you used to do like swimming and all of these other things you used to do, I think you said you played tennis, you used to do a lot of walking?

A Yes, I did a lot of camping, I was a boy scout.

Q All of these things, were they things that you took great pleasure in doing?

1 A Yes, quite a bit.

2 Q And all of these things, have you done any of those
3 things ever since you lost your leg?

4 A No.

5 Q In regards to clothes, do you have any special
6 expenses that you run with regard to clothes or special clothes
7 of any kind or special equipment of any kind?

8 A It is medical stuff, every time I get a pair of
9 shoes --

10 Q Yes.

11 A I have to have approval from the people that make
12 the prosthesis and they have to adjust it according to whatever
13 shoes. I couldn't just go out and buy the modest shoes that
14 are out.

15 A Pants, I have to wear large pants that have been
16 tapered.

17 Q With regard to these openings and closings of the
18 wound, that is where the amputation is, the stump, can you
19 tell us whether they are opening just as frequently this
20 year as in the past year, has this year or two years ago, are
21 they more frequently or less frequently?

22 A Do you understand, I'm trying to get a pattern.
23 How is that running?

24 A It is hard to say.

1
2 I have tried, everytime I have tried to get a
3 job, I work as medico, I was sitting down quite a bit at
4 Medico, but even then it opened up.

5 Q It doesn't follow any particular pattern?

6 A Oh, it depends on -- well, if I stayed at home
7 with my leg off the rest of my life it would heal, I would
8 guess, but as soon as I would walk on it it would open.

9 Q How about your apartment, how do you get around
10 the apartment, do you wear the artificial leg or crutches?

11 A I hop.

12 Q You hop on one leg?

13 A Yes.

14 Q When you get up at night with phantom pain to
15 bath the stub or to go to the bathroom from your bedroom,
16 how do you get there?

17 A It's a little difficult to describe, I will
18 either walk on my hands and knees --

19 Q What do you mean by that?

20 A Well, first I have to orientate myself where
21 I am, I am waking up, you just can't jump out of bed and
22 start bouncing, so I have to walk, but I don't want to
23 disturb the people underneath me so I try to sit on my
24 rump and move along with my feet.

25 Q In a sitting position on the floor?

1
2 A Yes.

3 Q Yes?

4 A Or in a sort of kneeling position.

5 Q You can hop on one foot to go to the bathroom,
6 can't you?

7 A But in the middle of the night I don't want
8 to disturb the people downstairs.

9 Q This is an apartment house?

10 A It is a private house but they hear me every
11 time I bounce, it disturbs them.

12 Q So you sort of slide along on the floor to the
13 bathroom?

14 A Yes, or to the kitchen, where ever I have to
15 go.

16 Q And if there is a television program, you get
17 the water and you carry it back into the bedroom and bath
18 it there?

19 A I do it in the living room because I am like
20 in an apartment with a kitchen so I do it just like that,
21 I do it in the living room because I am near the kitchen
22 then.

23
24 MR. KELNER: I think I am through, your Honor.
25 May I just have one moment, please.

(Mr. Kelner then conferred with associate counsel

MR. KELNER: You may inquire.

THE COURT: Would you want to take a short recess or do you want to start?

Perhaps we had better start.

MR. RUDOFISKY: I want to say, your Honor, that Mr. Kelner has advised me that he has to leave today at four o'clock, so sooner than --

MR. KELNER: With your Honor's permission.

MR. RUDOFISKY: I am wondering whether, and I certainly am not going to be able to conclude within a half hour, but since Mr. Kelner has to leave and we have discussed that possibility --

MR. KELNER: This was brought up a little unexpectedly.

Perhaps we can break at this point and continue to pick up with the entire cross-examination the next time we are able to meet.

Your Honor, perhaps we should go off the record.

THE COURT: Yes, yes.

(A discussion was held off the record.)

THE COURT: All right, gentlemen, we will meet at 2:15 tomorrow and then complete it on Wednesday.

(At 3:35 P.M. a recess was taken until March 8, 1977 at 2:15 P.M.)

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1
2 UNITED STATES DISTRICT COURT

156

3 EASTERN DISTRICT OF NEW YORK

4 -----X
5 ROBERT A. LENNON, :

6 Plaintiff, :

76-C-396

7 -against- :

8 UNITED STATES OF AMERICA, :

9 Defendant. :

10 -----X

11
12 United States Courthouse
13 Brooklyn, New York

14 March 8, 1977

15 2:00 o'clock p.m.

16 B e f o r e :

17 HONORABLE MARK A. COSTANTINO, U.S.D.J.
18
19
20
21

22 EMANUEL KARR
23 OFFICIAL COURT REPORTER
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Appearances:

JOSEPH KELNER, ESQ.
JAMES H. DEUTSCH, ESQ.
Attorneys for Plaintiff

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: EDWARD S. RUDOFISKY, ESQ.
Assistant U.S. Attorney

THE COURT: All right, gentlemen.

MR. RUDOFSKY: Good afternoon, Judge.

THE COURT: You may examine.

MR. RUDOFSKY: Thank you.

ROBERT A. LENNON, having been previously
sworn, continued to testify as follows:

CROSS-EXAMINATION

BY MR. RUDOFSKY:

Q Mr. Lennon, I noticed several times during
your direct examination by Mr. Kelner that if you didn't
understand precisely what he was saying or anything of that
nature you indicated that to him, and I hope you will do the
same with me so if I ask a question that you don't under-
stand or if I use a word that you don't understand, please
tell us that and we will work it out.

O.K.?

A Yes, sir.

Q I think it is agreed that you were in the Saint
Albans Naval Hospital from June of 1972 through December of
1972, with approximately a week at home?

A Yes.

Q And then in May of 1973 you went to Castle
Point veterans Administration hospital and you were under
the continuous care of the Veterans Administration thereafter

1
2 until December of 1974, with various admissions and discharges,
3 as you have explained: right?

4 A Yes.

5 Q Now, let me ask you this:

6 At any time during either of these
7 hospitalizations, either the hospitalization by the Navy or
8 the hospitalization by the Veteran's administration, did you
9 refuse to take any medication or any drugs that were
10 prescribed for you?

11 A To the best of my recollection I can't say, I
12 don't remember.

13 Q You don't remember.

14 Did you ever leave any of the hospitals that
15 you were in without permission?

16 A I don't recall ever having done so.

17 Q Did you ever take any medication or drugs
18 that weren't prescribed for you?

19 A No.

20 Q Do you recall any personnel of the Veteran's
21 Administration at any time taking any medication away from
22 you, any pills: do you have any recollection of that?

23 A I remember one instance, what had happened I
24 don't recall, where or when.

25 Q Do you recall if it was in the Veteran's

Administration Hospital, as I have characterized it, the Veterans Administration Hospitals, or could it have happened in a Naval hospital; do you recall that?

A For some reason the Brooklyn VA sticks in my mind.

Q Can you tell us what the circumstances were?

A No, I don't remember. That is why I don't recall if it was even in the Brooklyn VA.

Q But you do have a recollection at this point of some thing taken away from you?

A Some, yes.

Q Do you know if that was medication that was prescribed for you, that is do you know why it was taken away, was any reason given to you at the time?

A I do not recall that they ever did, I don't remember.

Q Now, I believe you testified yesterday that you were in -- and will you tell me if this is your characterization of it or if it is correct -- that you were in constant pain throughout your hospitalization: is that an accurate statement?

A I would say yes.

Q And when we say throughout your hospitalization, now I mean from you wakening, some time on June 10th, after

1
2 you fractured leg had been operated on, throughout your stay
3 with the Navy, your admission to the Saint Albans hospital,
4 and then again throughout your admission to the various
5 Veteran Administration hospitals?

6 A I would say yes, sir.

7 Q Now, am I also correct that your leg was
8 draining, and I think you know what I mean by the use of the
9 draining, don't you?

10 A Yes.

11 Q That your leg was draining throughout your
12 stay at Saint Albans?

13 A I can't say definitely all the time, I
14 remember it draining quite frequently, yes.

15 Q Do you remember a time when it wasn't draining?

16 A This was in Saint Albans?

17 Q Saint Albans.

18 A I can't say I definitely remember.

19 Q Do you recall if your leg was draining on the
20 day that you were finally discharged to go home in December
21 of 1972?

22 A No, I don't.

23 Q You don't recall?

24 A I don't recall.

25 Q O.K.

1
2 You testified yesterday that the wound smelled.

3 Will you tell us when the wound or when your leg
4 started to smell, to the best of your recollection?

5 A No, I can't say definitely, I don't know when.

6 Q Do you remember a time at Saint Albans when it
7 didn't smell?

8 A In the beginning it didn't smell.

9 Q Can you tell us with reference to the July
10 28th operation performed by Doctor Nevaizer, can you recall
11 if your leg was smelling by that time?

12 A I couldn't say yes or not because it was open,
13 they were cleaning, and they would wash it and the sort,
14 and it wouldn't smell that bad.

15 Q Is it true, though, that you do have a
16 recollection that the leg did smell at some time while you
17 were at Saint Albans?

18 A Definitely.

19 Q Now you testified yesterday that there came
20 a time while you were a patient at Saint Albans that you
21 remember being put in isolation.

22 Can you explain what you meant by that?

23 A I remember they said that my leg had infected
24 and that I had to be isolated from the rest of the patients
25 on the ward and they put me in a room by myself.

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Q Do you recall when that was?

A No, I'm sorry, I don't.

Q Do you recall if you were an in patient immediately before this happened or had you been on a pass or had you been discharged and then came back to the hospital or whatever the circumstances were?

A No, I'm sorry, I don't.

Q Now, when you were put in isolation, is that when you were told you had osteomyelitis, or were you told you had osteomyelitis some other time?

A I remember for some reason that when I had the staph infection, and that is why they were wearing garments to come in and visit.

Q Did you know what a staph infection was when they told you?

A No, I knew it was an infection, that is all.

Q Did you ask what it was?

A Yes.

Q You asked at that time?

A Yes.

Q Can you tell us in words or in substance what they told you?

A I t was an infection that came about the tissue of a broken -- of an open wound, when it gets infected.

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Q Now, there came a time, didn't there, when you came out of isolation and you went back on the ward; is that correct?

A Yes.

Q Do you remember when that was?

A No.

Q O.K.

At that time when you were out of isolation, did you ask anyone else besides the doctors what a staph infection was?

A I don't recall.

Q Now, with reference to being in isolation, had they told you that you had osteomyelitis before or after you were in isolation?

A I think it was after.

Q Were you told you had osteomyelitis or were you told you had chronic osteomyelitis or were you told some other thing, and if so, tell me what it is?

A I think the way they put it was I had a staph infection and the staph infection with a broken bone they call a staph infection, osteomyelitis, because it is in the bone now.

Q Do you recall what you were told about the osteomyelitis?

1
2 A It is a bone infection.

3 Q Were you told how long it lasts?

4 A I don't recall.

5 Q Were you told that you had chronic osteomyelitis?

6 MR. KELNER: Could we fix the time on it,
7 counsel, or are you still talking about the first
8 period of hospitalization or a year later.

9 MR. RUDOFISKY: I am talking about the hospital-
10 ization at Saint Albans, the discussion that took
11 place with the Navy doctors or the hospital personnel
12 about contracting osteomyelitis.

13 MR. KELNER: In what period, from June to
14 December?

15 June to July?

16 MR. RUDOFISKY: Well, the broader period would
17 be June to December, since the witness does not
18 specifically recall when the conversations took place.

19 MR. KELNER: O.K.

20 MR. RUDOFISKY: We will try it again.

21 Q Were you told at any time during this period,
22 June to December, that you had chronic osteomyelitis?

23 A No.

24 Q Now, you say no, is it that you don't recall or
25 that you are definitely sure you weren't told?

A To the best of my recollection I don't believe
I was ever told that it was a chronic thing.

(Continued)

1
2 Q Now, you gave a deposition in this case, didn't
3 you?

4 You testified and I was there and your lawyers were
5 there and a court reporter was there: do you recall that?

6 A Yes.

7 Q I am referring to page 52 at line 17.

8 Do you recall being asked the following question and
9 giving the following answer --

10 MR. RUDOFISKY: I will say to counsel that there
11 was an objection and if you wish to press it.

12 MR. KELNER: What page is that?

13 MR. RUDOFISKY: Line -- page 52.

14 MR. KELNER: Page 52.

15 MR. RUDOFISKY: Yes, line 17.

16 Q "Question: When was the first time you were
17 told that you had chronic osteomyelitis?"

18 And the answer: "Answer: I remember where and who but
19 I don't remember when.

20 "Question: Where was it?

21 "Answer: Doctor Nevaizer in Saint Albans."

22 Do you remember being asked those questions and giving
23 those answers?

24 A Yes, I do.

25 Q Now, were those answers the truth?

1
2 A To the best that I remember, yes.

3 Q Now, let me ask you again:

4 When was the first time that you were told that you
5 had chronic osteomyelitis?

6 A The first time the word chronic was used was
7 in Castle Point.

8 Q So then your testimony that Doctor Nevaizer
9 told you that you had chronic osteomyelitis, you are now
10 changing that?

11 A No, Doctor Nevaizer told me I had osteomyelitis,
12 I made a mistake in half of it.

13 Q Now, when you were wounded in Viet Nam, you
14 were subsequently hospitalized; is that correct?

15 A Yes.

16 Q And were you in a orthopedic ward or were you
17 in some other type of ward for people with other kinds of
18 injuries; do you recall?

19 A No, I don't.

20 Q Do you recall if the other men in your ward
21 when you were in the Marine Corps Hospital if they had
22 broken legs or if they had other injuries other than broken
23 legs?

24 A I was in quite a few hospitals from Viet Nam
25 to New York.

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Q I see.

In these series of hospitals that you were in, then, were you hospitalized along with men, to the best of your knowledge, I mean, were you hospitalized with men who had broken legs or with men who had other injuries or both?

A I think it was everything, I couldn't say.

Q During that period when you were in these Marine Corps hospitals -- by the way, how long were you in the Marine Corps hospitals?

A There are no Marine Corps hospitals, it is all different services.

Q How long were you in hospitals, how long were you hospitalized following your injury in the Marine Corps?

A Over a year, a little bit over a year, I believe

Q Do you recall how many hospitals you were in?

A No.

Q Do you recall any one that you were hospitalized with contracting osteomyelitis?

MR. KELNER: If your Honor please, I don't want to interrupt but I don't see the relevancy of this.

MR. RUDOFSKY: If we can have a side bar I will be more than happy.

THE COURT: No, no, there is no jury.

MR. RUDOFSKY: It is not a jury, I don't want to influence the witness.

THE COURT: All right, I will allow you to ask a few more questions and see where it goes. !

BY MR. RUDOFSKY:

Q Can you recall anyone contracting osteomyelitis?

A No, I don't believe so.

Q Do you have any recollection of how many people, how many men -- well, I will withdraw that.

At Saint Albans, you were in Saint Albans for approximately six and a half months; is that correct?

June through December 1972?

A Then I went back.

Q This is Saint Albans?

A The right leg?

Q The left leg.

A Yes.

Q O.K.

Were you ever in the orthopedic ward at Saint Albans during that period except for when you were in isolation?

A Yes.

Q And can you tell us during the period you were there, and you told us yesterday that the patients had different terminology for things and that you apparently

discussed many of these procedures and had slang names for them and the sort, did anybody else come down with osteomyelitis while you were there, that you know of?

A I wouldn't know, they would have been in F-3, that is where you are moved to when you have got infections, you are moved to there.

Q Do you know anyone whom you were hospitalized with who came down with osteomyelitis?

A I can't say I remember anybody.

Q Do you know anyone, do you have any knowledge of who else came down with a staphylococcus infection?

A I can't say definitely, I don't know.

Q You don't recall?

A I don't recall, no.

Q When you awoke following the initial reduction of the fracture, the initial surgery, after you were injured on the motorcycle, did there come a point in any of the following days, right after that, that a doctor came in or a nurse came in and you talked with any doctor or nurse about how long you would probably be in the hospital or how long you would be incapacitated: do you recall any conversation of that nature?

MR. KELNER: Do you mean June when he was first injured?



173

BY MR. RUDOFSKY:

Q Shortly after you were injured, any time in June of '72?

A I can't state I definitely did, I don't remember.

Q Did you testify yesterday that you thought you were going to get out some time in July?

A I stated yesterday --

Q Do you recall stating that yesterday?

A I don't recall that.

Q O.K.

Do you recall having that thought, though, towards the end of June or the beginning of July that you would be discharged shortly?

A Six weeks sticks in my head, I don't remember whom the conversation was with or what it was about, but I remember somebody told me, "you would be out in six weeks."

Q That you would be out in six weeks?

A Pardon me, I shouldn't say that, someone said it should be out in six weeks.

Q Six months later when you were still in the hospital and you had osteomyelitis and they told you had contacted a staph infection, did you think there was anything unusual about that?

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A No.

Q Did you wonder how come you didn't get out in six weeks?

A They tell me it was because of that infection.

Q At any time during this Saint Albans hospitalization, did you worry about the progress that your leg was making?

A I don't understand, how I was healing?

Q Right, did you worry about that at all?

A No.

Q How about when you saw that hole in your leg that you testified to yesterday for the first time, this dime sized hole, did that cause you any apprehension, did you worry about that?

A No, that was -- well, the first time I saw it it was a big hole, at the time it had gotten a hole a dime size, it was smaller.

Q Then it got bigger again?

A They cut it bigger, when it got real big that is when they cut it.

Q Did that cause you to worry at all that they had to come back and cut it again and that you had to start healing all over again?

MR. KELNER: Your Honor, I must object as to

whether he worried or didn't worry, the condition was there.

THE COURT: Yes, I agree.

MR. RUDOFISKY: I think you are perfectly right, your Honor, except for the fact that we do have the statute of limitations defense in this case which first of all goes to a reasonable man standard, whether a reasonable man would have worried about it, and second of all what he thought about it.

I think it is very much in the case, the operation of his mind.

THE COURT: I will take it for whatever weight it is entitled to.

O.K.

MR. RUDOFISKY: Thank you, your Honor.

(Continued.)

BY MR. RUDOFSKY:

E A 175

Q Mr. Lennon, you testified yesterday that the presence of pain, that you had phantom pains and you had pains with respect to your stump; is that correct?

A Yes.

Q Are you taking any medication for these pains?

A Right now?

Q Well, first of all are you taking any medication today?

A I took two aspirins this morning.

Q Now more generally, do you have a prescription or orders from a doctor to take medication at the present time, regardless of whether you took it today or not?

A Yes.

Q What kind of medication are you taking?

A Right now I don't have any, right now I don't have any, but it varies depending upon the pain that I have. It is different, it is different when it opens and closes and it depends upon how open it is or how much it helps.

Q Which doctor prescribed this medication for you?

A Which ever doctor I go to at the time that I go to him.

Q Well, who was the last doctor who prescribed medication for you, pain-killing medication?



A Doctor Koven.

Q What kind of medication did he prescribe, do you know?

A Yes.

Q Could you tell us?

A Tylenol.

Q Do you know what Tylenol is?

A It is a aspirin with no aspirin.

Q Does tylenol help?

A The one that he gave me, it wasn't that good at the time.

Q Do you know of any reason why you can't have stronger medication than tylenol?

MR. KELNER: I object to this, this is a medical area which he wouldn't be competent to answer in.

THE COURT: I will sustain it, yes, it is not for him.

Tylenol comes in many strengths, it is non-prescriptive and prescriptive, both.

I presume it would be up to the doctor.

It depends on the pain, some is pain-killing and some is not.

MR. RUDOFSKY: We will go into it with Doctor

1
2 Koven.

3 BY MR. RUDOFISKY:

4 Q You testified that you have problems sleeping
5 through the night; is that correct?

6 A Yes.

7 Q Now at any time since your discharge from
8 the VA hospitals, your final discharge in December of 1974,
9 have you taken any sleeping pills or other medication to
10 help you sleep at night?

11 A Yes, I have.

12 Q And will you tell us when you took such
13 medication or sleeping pills and what, if you know, what
14 medication or what kind of sleeping pills you took?

15 A When, I couldn't say definitely, what they are,
16 I just know them as the red one or the white one.

17 Q These were prescribed by a physician?

18 A Yes.

19 Q What was the name of the physician?

20 A Doctor Kaplow.

21 Q So that then Doctor Koven had not prescribed
22 any sleeping pills or other medication to help you sleep at
23 night?

24 A No.

25 Q Have you complained to Doctor Koven about being

unable to sleep at night?

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A Yes.

Q Have you used a wheelchair?

A Yes.

Q Would you tell us when and under what circumstances?

A Do you mean outside of the hospital?

Q Right.

A Upstate New York, my mother's home.

Q At your mother's home?

Yes.

Q And was that before your amputation or afterwards or both?

A Before.

Q Have you used a wheelchair at all after the amputation, subsequent to the amputation?

A I don't recall.

Q You presently don't have a wheelchair, do you?

A No.

Q To the best of your knowledge, is there any reason why you cannot use a wheelchair?

A No.

Q Do you suppose if you had a wheelchair you wouldn't have to be crawling on the floor at night to get

1
2 to the bathroom and soak your foot?

3 A I don't think that the doors would permit it.

4 Q But have you investigated that?

5 A Yes, my mother has one upstate, the one that
6 I used to use and --

7 Q It is too wide?

8 A Yes.

9 Q Have you gone to any medical equipment
10 company or companies that supply wheelchairs and seen what
11 widths wheelchairs come in?

12 A No.

13 Q Now I believe you testified yesterday that
14 you live in a private house above somebody, is that correct?

15 A Yes.

16 Q Do they live in the basement or do they live
17 on the first floor?

18 A Both basement and the first floor.

19 Q Where do you live?

20 A Above that.

21 Q On the second floor?

22 A Yes.

23 Q How do you get up the stairs?

24 A There is a stairwell.

25 Q You walk up the stairs?

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2 A Yes.

3 Q You don't have any sort of elevator or seat
4 that you can sit in and that moves up the stairs electronically
5 or anything like that, mechanically?

6 A No.

7 Q On the average, do you go out every day outside?

8 A No.

9 Q How often do you go outside?

10 A It varies.

11 Q Well, when you can wear your prosthesis, how
12 often do you go out?

13 A I don't, I try not to put the prosthesis on
14 unless I have to go out, a couple of times a week.

15 Q Have you looked for an apartment without steps?

16 A Yes.

17 Q And I take it you have not been able to find one?

18 A No, not for the money that I can afford.

19 Q How much rent are you paying now?

20 A \$125 a month.

21 Q What section -- I think you said you live in
22 Brooklyn?

23 A Yes.

24 Q What section of Brooklyn?

25 A Flatbush.

1
2 Q When was the last time you looked for a new
3 apartment?

4 A I believe it is almost a year ago.

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6 (Continued on the next page.)
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Q Now, I believe you testified yesterday that you had a hard time accepting the necessity for an amputation? Did I understand you to say that?

A Yes.

Q Would you explain in your own words what you meant by that when you said it?

A Well, I remember the talking, Saint Albans, that the leg would never have to come off. We could work at it, keep it. Just took a lot of work. A lot of time. And I was pretty active. I didn't want to lose it so I -- I didn't want to believe it, you know.

Q Now, you have been pretty active before, you testified yesterday with your sports and camping and that sort of thing; is that correct?

A Yes.

Q And did you find that when your --
When your leg was broken and this period in Saint Albans when -- the diseased healing and that it didn't heal so well, and that whole period of June to December, '72, and during the period, the following period with respect to the Veterans Administration up to the decision to amputate, did you also have trouble in the same vein, adjusting to this limitation on your mobility to the fact that your leg was broken and it hadn't healed all that well?

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2 A Every thing was temporary. We were doing
3 exercises. We kept busy. And everything was just toward
4 getting out until the day the leg healed.

5 Q Now, I take it, from your testimony yesterday
6 that the amputation has caused you some problems socially?
7 You explained about going out on dates and not going on a
8 second date with a girl and things of that nature? Have
9 you sought any professional counseling with -- or have you
10 had any professional counseling with regard to adjusting to
11 life without the limb?

12 A I haven't. I have asked, but I haven't sought
13 any professional -- or gone to any office -- you mean
14 psychologist, psychiatrist?

15 Q Psychologist, psychiatrist, social workers,
16 ministers? Have you seen anyone for counseling with regard
17 to adjusting to life without the limb?

18 A No.

19 Q When you say you ask, but you haven't seen
20 anyone, would you explain specifically what you're --

21 A I have a lot of friends that went to therapy
22 and such but I could never afford it.

23 Q Are you aware that there are any reduced costs
24 or free counseling services in the New York area?

25 A I heard of two, but they are in Manhattan. And

you have to go by train or by bus. I don't always have a car.

Q Have you joined any organizations for the handicapped or the disabled or any disabled veterans organizations?

A Yes.

Q What organizations have you joined?

A I am a life member of the disabled American veterans.

Q Have you joined any other organizations or looked into joining any others?

A No.

Q Now, you in response to Mr. Kelner's direct yesterday, you indicated that this -- as I heard you and as I read it last night in the transcript, that you had met these girls that you subsequently had problems with because of the -- your amputation? You met them in -- I think you said a discotheque or discotheques or in a bar or bars; is that pretty accurate?

A Yes.

Q Have you looked to meet girls in other sorts of activities where -- well, let me rephrase the question.

Have you met girls or looked to meet girls at any other sort of activity other than discotheques and bars?

A Yes.

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Q would you tell us something about that?

A I met a girl a couple of weeks ago at a party.

Q Social party?

A Yes.

Q Was there dancing at the party?

A Yes.

Q O.K. Other than parties with dancing and
discotheques with dancing and bars, have you looked to meet
girls in any other situations or any other circumstances?

A No.

Q Let me backtrack for a moment to your pre-
amputation hobbies and that sort of thing when you told us
about sports and camping. Do you have any less physical
vigorous hobbies? Did you have any at that time?
Do you have any now? Do you play cards?

A Once in a while.

Q Do you like to read?

A Yes.

Q Do you read a lot?

A I'm reading now, since the hospital.

Q You play chess?

A No.

Q Do you have any -- I mean, you know, there are
a whole litany of them. Could you tell us, using those as an

example, are there things that you like to do that you are still able to do?

A I watch television.

Q Anything else?

A I play checkers.

Q Those are all that come to mind?

A Yes.

Q Mr. Kelner asked you yesterday if -- who did your shopping for you. I think you responded that your friends did, you have two sisters in the area? Did you ever have groceries or food delivered to your apartment?

A I tried once. I wanted to. You mean delivery places -- people that deliver groceries?

Q Well, I think we can-- if there is no objection, I think we all realize that there are supermarkets and other retail stores that offer delivery services. Maybe they charge twenty-five cents a bag or something of that nature. I am asking you if you ever had any groceries delivered to your apartment as opposed to someone going out and fetching them for you?

A I try to get the cheapest -- cheapest place I can go. Most of the time I go to the PX and a friend helps me.

Q You go yourself to the PX?

A With him.

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Q Right. Now, I understand that from the nature of your answer that you are trying to minimize your specific expenses, but if we assume for a minute that you -- that money for this purpose was not a problem, are there stores in your neighborhood that could deliver food to you, so far as you know?

A The smaller stores might. I don't know.

Q As a matter of fact, as a teenager you delivered groceries in your neighborhood, didn't you?

A Yes, I did.

Q I think we established yesterday that you have had four prostheses since your operation? Two I will refer to them as temporary prosthesis and then two permanent prostheses; is that correct?

A Yes.

Q And the first of the permanent prosthesis was you acquired that while you were being treated by the Veterans Administration; is that correct?

A Yes.

Q The second one you acquired while you were being treated by Doctor Kaplow or Doctor Koven or someone else?

A If it was anyone, it would have to be Doctor Kaplow right after I got out of the hospital.

Q Do you know who made the first permanent

prosthesis? What company?

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A I believe it was always Amken.

Q Is it Amken that fitted the prosthesis and designed it for you?

A Yes. They do everything.

Q Is it not the doctor?

A No.

Q When was the last time that you were back to see anyone at Amken about you prosthesis?

A I don't recall the date.

Q Well, could you approximate? Was it in 1976?

A Might have been January, this month.

Q January of '77? Is that January of this year.

A Yes.

Q You're saying approximately two months ago?

A Something like that. Yes.

Q Was that to see them about the prosthesis that you're wearing now or some other prosthesis?

A No. I wouldn't wear the other ones. I only wear -- I think -- I'm thinking to the last time that Doctor Kaplow was trying a different way. It's this prosthesis. It's always this prosthesis. They are trying to get one to fit properly.

Q Now, have you explained your prosthesis

problems to the person or people that you deal with at Amken?
Have you told them about the swelling and the fact that you
can't wear it and the other things that you described
yesterday?

A Surely. They used to be in the Brooklyn VA
clinic every week when I go there.

Q O.K. Since you got out of the VA, have you
told them all about your problems with the prosthesis?

A Surely.

Q Have they made any statements to you to indicate
what the nature of these problems are, what the cause of these
problems are? Now, when I say, they, I mean the people from
Amken?

A I don't know if they did. Did they tell me what

Q Yes.

A I don't believe so. I don't know.

Q Now, as a teenager, you -- as you have already
indicated today, you delivered groceries and you delivered
laundry and you delivered newspapers, then there came a time
when you were working in a jewelery store?

A Yes.

Q And following that you went to work for Grafbell
Electric, correct?

A Yes.

Q This was an after-school job; is that correct?

A Yes.

Q Did you ever work for Rothbell full time?

A Yes, I remember working full time. I don't remember when. It might have been during the summer when I wasn't going to school. That was before I got out. I don't remember.

Q Did you ever belong to the Electrical union number three?

A No.

Q Were you ever licensed as an electrician?

A No.

Q You indicated that you considered yourself an apprentice electrician; is that true?

A Yes.

Q Were you in a formal apprenticeship program?

A No.

Q Were you registered anyplace as an apprentice?

A No.

Q When you said -- you testified that as far as you understood, one has to be an apprentice for 5 years at a minimum before applying to the union; is that accurate?

A No. I don't believe so.

Q What was your understanding or what is your

1
2 understanding?

3 A That if you are going for the union apprentice-
4 ship, it's five years forthat apprenticeship to become a
5 mechanic, a full mechanic.
6

7 Q First you have to get into the union?

8 A Yes.

9 Q O.K. So that an apprentice electrician, is that
10 somebody who is in the union, as far as you understand?

11 A That title, yes.

12 Q As far as you understand, an apprentice
13 electrician is a full-time worker?

14 A Yes.

15 Q Did you ever have any formal training as
16 opposed to on-the-job training in electronics? I mean,
17 you mean, being an electrician?

18 A No.

19 Q Did you ever attend a trade school?

20 A No.

21 Q I think you graduated from Erasmus Hall high
22 school, correct?

23 A Yes.

24 Q I think you have an academic diploma?

25 A Academic and general. It was mixed.

Q What was the nature of your training in the

Marine Corps after basic training?

A We had a few different trainings.

Q Did you have one particular function in the Marine Corps where you were attached to a certain unit?

A Yes. My primary MOS was with self-propelled guns.

Q What is an MOS? I think we all know, but for the record --

A It's your job. I don't know what the MOS stands for.

THE COURT: You don't know what MOS stands for?

THE WITNESS: Not in the army.

THE COURT: Do you know what an MOS is? Special

THE WITNESS: Specialty.

THE COURT: Specialty number.

THE WITNESS: We only use it in the Marine Corps. But I don't think they use it in the army.

THE COURT: They had to use it in the army.

I remember my MOS. I don't want to tell you what it is.

Q What was yours?

A 0800. Self-propelled guns. Tanks. Big guns that move.

Q What did you do on the guns?

A Nothing. I was too big for them.

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3 Q What do you mean? I am sorry. Did you work
4 as an electrician in the Marine Corps?

5 A No.

6 Q When you went into the Marines, did you tell
7 them you were an electrician?

8 A I didn't tell them I was an electrician. I
9 told them I was I was working as an assistant electrician.

10 THE COURT: That doesn't do much good. That's
11 just a personal observation.

12 MR. RUDOFSKY: Just bear with me for a minute.

13 Q Mr. Lennon, do you recall upon any of your
14 admissions, your various admissions that are involved in this
15 case, Saint Albans or to any of the VA hospitals, do you recall
16 being asked if any time what your civilian occupation was?

17 A No.

18 Q Specifically, do you recall -- do you remember
19 with respect to your admission to Castle Point on May 30th,
20 1973, do you recall being asked what your civilian occupation
21 is, and you responded, none, you didn't have any?

22 A I didn't have any during then.

23 Q O.K. Let's take it -- first, do you recall being
24 asked that question?

25 A No.

Q But your testimony is whether you were asked the



question or not at that time you didn't consider that you had an occupation; is that right?

MR. KELNER: If your Honor please, that is several years after he's been injured. At that time it certainly would be accurate. I think that is argumentative and equivocal question I think.

THE COURT: All right.

(Continued on the next page.)

MR. RUDOFSKY: I want to point out, your Honor, that although -- just for the record, and I won't press the point -- I think the point is made.

THE COURT: I understand.

MR. RUDOFSKY: While it is several years after he's injured, it's still a year and a half before the leg is amputated. And the claim here is not that the original injury prevented him from going on, but the amputation prevented him from going on and we will get into that. I will be more than happy to brief that for the Court.

THE COURT: No, we don't need that. Go ahead.

Q Now, continuing along in this vein, you had the accident with the motorcycle in June of 1972 and you were in the hospital with one minor -- one week at home, you were in the hospital until December, '72? Between your discharge from St. Albans in December of 1972 and the amputation of your leg in October of 1974, did you ever work as an electrician during that period?

A I never worked as an electrician. I never did. I never did any major rewiring to a new building.

MR. KELNER: I am sorry. Did you say after June?

MR. RUDOFSKY: I said after December, '72 to

October of '74, when the leg was amputated.

MR. KELNER: Okay.

Q Now, at the time of the June, '72 accident, were you working for Rotbel or had you already started working for Vetco at that point?

A This is when I had the bike accident?

Q Right.

A I was working for Vetco.

Q Now, how much money did you make when you were working for Vetco?

A It would vary.

Q What did it vary between?

A If we were very busy -- depended on what the job we were doing and how much they brought in to pay us.

Q Do you remember any figures?

A Might be a hundred and a hundred and fifty -- no. I'd say about a hundred and fifty. Closer to a hundred and fifty.

Q Was it fairly constant or just varied?

A Just \$25 one week or another.

Q So did you ever make more than a hundred and fifty?

A Yes.

Q When you were working for Rotbel, which, if

I recall correctly, was the job you had between Vetco --

A Yes.

Q How much did you make when you worked for Rotbel?

A It was an average of about a hundred and a quarter.

Q Now, I want to bring you up to 1975, after you had been discharged from the Veterans Administration Hospital, January, 1975. What was the first job you took after you left the Veterans Administration Hospital?

A I think I -- that was the gas station.

Q Do you have any recollection of going back and working for -- at Jacobson Boiler Maintenance or whatever the name of the firm was after the amputation?

A I might have. I don't recall.

Q Okay. Do you recall working at the gas station where you pumped gas and -- right?

A Yes.

Q And then you drove a gypsy cab?

A Yes.

Q Is this the only car service that you applied for a job at or did you apply for a job at other car services?

A I phoned a few.

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2 Q Okay. And following the gypsy cab and then
3 you were home for a while? You explained that yesterday?
4 Then you had a job with Mebco, correct?

5 A Yes.

6 Q That was from April of 1975 to September of
7 1975, correct?

8 A Yes.

9 Q Will you tell the Court what your duties
10 were at Mebco?

11 A I was a telephone operator. It's called a
12 dispatcher for electricians and refrigeration and air
13 conditioning personnel.

14 Q Well, maybe we can get a little more detail.
15 I don't want to know every move you made, but basically,
16 am I correct in assuming because someone called in that you
17 would then contact the appropriate repairman or crew and
18 send them out? Is that basically what you did?

19 A That's it basically, yes.

20 Q Did you have to make any decisions as to
21 which particular crew would go to which place or something
22 of that nature?

23 A Some. Yes.

24 Q And would that decision be based on the
25 availability of the crew or the type of work to be done

1
2 or both of those things or any other factor?

3 A Numerous reasons.

4 Q Well, okay. Will you give me an example of
5 the -- give me the list of reasons.

6 A If a press house called up with a -- the
7 machines that run like newspapers, big presses -- if a
8 switch control box went on that, or if the motor went on
9 that, if the control box went on it, you would call an
10 A mechanic. Or if you needed wiring, a lot of wiring done,
11 you'd call an A mechanic. If it's an electric motor, you
12 would call an M man. That's a motorman. There's a whole
13 assortment of different reasons.

14 Q Well, did you ever have -- did you have to
15 make decisions in dispatching that were more technical than
16 that at any point? Or did you -- as if it was a motor and
17 they called up and said the motor was broke, you'd send a
18 motor mechanic? If they said something is wrong with the
19 wiring, you'd send an A mechanic? If they said there was
20 something wrong with the air conditioning, you would send
21 an air conditioning crew?

22 A I usually asked the supervisor if I could find
23 one.

24 Q A supervisor in Mebco?

25 A Yes.

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2 Q I believe you didn't testify to this yesterday
3 but I believe on the basis of what you testified to at the
4 deposition that you at one point -- you applied to be a
5 city bus driver; is that correct?

6 A Yes.

7 Q What happened with that application?

8 A We took the test. But we were told that it
9 was futile. At the test they told us they were firing
10 bus drivers instead of taking them on.

11 MR. KELNER: I am sorry. I didn't hear that.

12 MR. RUDOFSKY: He was told that it was futile.
13 They were firing, nor hiring.

14 Q When did you make this application?

15 A October, I think.

16 Q Of?

17 A A little after I got -- I left Mebco.

18 Q October of 1976?

19 A I believe so. Yes.

20 Q That's two years after the amputation, right?

21 A Yes.

22 Q Have you ever taken an aptitude test?

23 A Yes. I believe so.

24 Q Do you recall where and when, what the circum-
25 stances were?

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2 A If that's what it was, I believe at 252 7th
3 Avenue, the Veterans Administration.

4 Q Do you recall what the results were?

5 A No.

6 Q Do you recall being advised to go to college
7 while you were at the Veterans Administration Hospital?
8 Anybody talk to you about possibly going to college?

9 A Yes.

10 Q Are you interested in going to college?

11 A Yes.

12 Q Do you plan to go to college?

13 A Yes.

14 Q Have you made any application to any college?

15 A No application, but requests for.

16 Q Requests for application?

17 A Yes.

18 Q Do you recall being told while you were in the
19 Veterans Administration Hospital and in connection with
20 going to college that you had a talent for science?

21 Do you recall that?

22 A No.

23 Q As far as you know, do you feel you have a
24 talent for science?

25 A I -- that was news to me. No, I didn't.

Q After you were released from the Veterans Administration Hospital at the end of 1974, you went back to work right away; is that correct? Took this job at the gas station?

A It was winter. I don't remember what day or month, but it was winter.

Q Do you recall the doctors at the V.A. discussing this job with you at all?

A I always ask permission.

Q Do you recall who you asked permission from?

A I would usually ask Dr. Smith.

Q Do you have a specific recollection of asking Dr. Smith about taking a job as a gas station attendant?

A I can't remember that conversation explicitly. No.

Q Do you recall -- you have any recollection of asking Dr. Smith if you should take a job where you would have to be on your feet pumping gas, and then with respect to your job driving a gypsy cab, talking to him about a job where you would have to use your artificial limb that much?

A The only one I remember talking to him about in his office was the Jacobson Boilers.

Q Do you recall when you talked to him about

1
2 that?

3 A It was before the amputation. Because I
4 asked him if I could with the winter, and he said, surely.

5 Excuse me. Would it be possible to get some water?

6 MR. RUDOFSKY: Okay.

7 THE COURT: Yes.

8 THE WITNESS: Yes.

9 Q Now, you testified yesterday that some
10 employers have indicated to you that they would hire you
11 except for the fact that they are afraid that you might
12 be hurt and they would have to support you on workmen's
13 compensation and that kind of thing? Do you recall saying
14 that?

15 A Yes.

16 Q Could you tell us when these statements were
17 made to you?

18 A I can remember one explicitly.

19 Q When was that?

20 A The phone company.

21 Q How long ago was that?

22 A It's when I had my leg.

23 Q It's when you had your leg?

24 A Yes.

25 Q Do you remember any others?

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A Not stating specifically. Just what I felt.

Q Is it fair to say that was your feeling?
You surmised that, but no one said it to you, right?

A Yes.

(Continued on next page.)

2 Q Now, with respect to Mebco, didn't you testify
3 that you also had the same feeling when you were terminated
4 by them that it was because of the leg that they didn't say
5 that to you?

6 A Not in so many words.

7 Q How was your attendance at Mebco?

8 A At the end then it wasn't that good.

9 Q You were having problems?

10 A Yes.

11 Q You testified yesterday that you were making
12 150 dollars a week at Mebco; is that true?

13 A That is what I started with, yes.

14 Q What did you end with?

15 A I think my last pay check was \$230 gross.

16 Q That is the most money that you had ever made
17 on any job?

18 A I made 237 the week before, I think it was.

19 Q At Mebco?

20 A Yes.

21 Q O.K., whether it is 230 or 237, was that the
22 most money, your Mebco salary, your weekly salary, was that
23 the most money you ever made on any job?

24 A I think so, yes.

25 Q Did you ever work at all a full year in civilian

1
2 life?

3 A Yes.

4 Q What year was that?

5 A I don't understand, full-time?

6 Q No, a full year, a 12 month year?

7 A I worked all year before I went to the service.

8 Q I know, but weren't you in school then?

9 A That is what I'm asking, if you meant full-time.

10 Q Did you ever work a full time job for a full
11 year?

12 A The one previous to going in, if I did, that
13 would have to be it.

14 Q What was that?

15 A That wasn't no, I was in school then, too.
16 I don't know if it was a full year, I don't recall, it was
17 a program with Rotbel.

18 Q When you say "program" I want to understand it:
19 What arrangements did you have at Rotbel then, they
20 were teaching you; right?

21 A Yes, they were going to -- I asked them, they
22 gave me the job to prepare me for what was going to be
23 necessary if and when I went to local 3.

24 Q But that was not a formal apprenticeship program,
25 that was just an arrangement that you had with Rotbel?

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1 A He is non-union.

2 Q He is non-union?

3 A Yes, there are shops that are private that are
4 non-union.
5

6 Q I will ask you again, that was not --, he was
7 not running any sort of training program, this was just an
8 arrangement that you had with him; is that correct?

9 A I don't know if he arranged any kind of
10 program, that is the way it was with me.

11 Q This was a personal thing that you worked out
12 with Dave Rotbel; isn't that right?

13 A With the company, yes.

14 Q Right?

15 A Yes.

16 Q Now, you told us something yesterday about
17 what you knew about becoming a union electrician, and at that
18 time I indicated that I would certainly not concede, and your
19 attorney doesn't claim that you are an expert on that, and
20 apparently we are going to hear from somebody in that regard,
21 but I would just like to follow, follow that line of question-
22 ing that Mr. Kelner started and find out what you understood
23 about what was involved in becoming a union electrician.

24 How long did you think you would have to work for
25 Rotbel before you would move up to the next rank or any other

Lennon-cross-Rudofsky

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word you want to use, move up the line,

MR. KELNER: I have to object to that unless you specify working for any electrician.

THE COURT: Right, I agree with that.

BY MR. RUDOFSKY:

Q Well, how long did you think you had to work in what you have called an apprenticeship before you would graduate to the next rank of electrician?

A I didn't even think about it.

MR. KELNER: I don't think he understands your question.

MR. RUDOFSKY: Let me try and go in to it, I think he understood, but let me see if I can get the record to reflect that fairly.

Q The people at Rotbel were teaching you different things about becoming an electrician: right?

A Yes.

Q And you refer to this as an apprenticeship: O.K.?

A Yes.

Q As far as you know, what comes after the apprenticeship?

A Mechanic.

Q And as far as you understood, how long would you have had to have been an apprentice before you moved up

1 to the mechanics level?

2 A I don't think I ever thought of it because
3 It's a long time and this was with non-union --

4 MR. KELNER: Just to save time, your Honor,
5 we will have someone is skilled and knowledgeable,
6 an expert on that, so we can supply any deficiency for
7 the record, that is if that will suffice for the
8 present purposes.

9 MR. RUDOFISKY: Well, the purpose of this, your
10 Honor, is to inquire as to this alleged goal of
11 becoming an electrician and the likelihood of that.

12 THE COURT: It is 5 years, then you become a
13 journeyman, then a master journeyman, and then after
14 that it is up to the union, what they are going to
15 make of you.

16 I think it is pretty common knowledge as to
17 the apprenticeship in any business, plumbing or the
18 electrical business.

19 Those are the closely knit ones that I know of.

20 MR. RUDOFISKY: May I just say, your Honor, that
21 I am not trying to bring out the reality as far as the
22 union is concerned that what his situation was.

23 THE COURT: I think I would have to listen to the
24 expert anyway, I don't even know whether having a
25

masters degree would help in the union, as far as the union is concerned and as far as being an apprentice or a journeyman, and they are two different categories.

MR. RUDOFSKY: Although I don't expect to argue it at this point, we may have a special question about the relevancy of that, given the witnesses testimony, but I assume we will get into that at some later point.

THE COURT: O.K.

BY MR. RUDOFSKY:

Q Mr. Lennon, I had asked you earlier on whether you recall in general at some point in your hospitalizations that we have been talking about with respect to your right leg, that is whether you recall refusing medication, and I think you indicated that you couldn't recall.

Now let me ask you specifically.

Do you recall refusing medication on or about December 16th, 1974 because you found out that it was Dalmane; does that refresh your recollection at all?

A I do remember that Dalmane -- was that for sleeping?

Q Well, the record indicates that it was, but I would like to have your recollection of the circumstances at this point.

A I remember it's a very strong knock-out thing,

very strong knock-out pills, and I didn't want to take it.

Q Mr. Lennon, when was the first time, and I want you to think before you answer this, when was the first time after your discharge from Saint Albans, the first time that you thought about suing the Government?

A I would have to say when I asked, when I asked my lawyer to check on that Castle Point instance.

Q Would you tell us about when that was?

MR. KELNER: You mean what year?

MR. RUDOFSKY: What month and what year?

A It was the summer -- May, 1975 I think.

Q Do you recall -- let me -- I am not just talking about suing the Government with respect to claims in this case, do you have a recollection of thinking about suing the Government for anything after your discharge from Saint Albans, at any time after that?

A Other than --

Q Right.

A No, I don't recall.

Q Do you recall telling a psychiatrist at the Brooklyn VA, whose name unfortunately I can't make out, that on or about December 17th, just before you were discharged, do you recall telling a psychiatrist that you might take legal action against the Government for incompetent treatment?

MR. KELNER: What year was that, please?

MR. RUDOFSKY: 1974.

MR. KELNER: December 1974?

MR. RUDOFSKY: December 1974.

Do you recall anything about that?

A I recall an incident, not that, but I recall an incident that might have caused me to say that.

I don't really recall the exact conversation.

Q Tell me what you do recall?

A I remember having problems at the hospital.

Q Which hospital is this?

A The Brooklyn Veteran's hospital.

Q And how does that relate to suing the Government?

Apparently it clicked in your own mind, so would you tell us about it?

A They were asking me to leave.

Q Was this in December or was this prior to December or --

A I think it was in December.

MR. KELNER: Of 19 what?

MR. RUDOFSKY: Of 1974.

(Continued.)

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Q All right, continue.

A When I got out of the Brooklyn VA, yes.

Q And you didn't want to leave?

A No, it was just after the amputation, they said something about drugs, I didn't want to leave, no.

Q Did you discuss the question of amputation with any doctor at Saint Albans?

A Yes, I believe I did.

Q What was the nature of that discussion, what did you say to the doctor and what did he say to you, and before you answer that -- I am sorry -- if you recall would you tell us who the doctor was?

MR. KELNER: Can you fix the year or time?

MR. RUDOFSKY: This is in Saint Albans, Mr. Kelner, it is obviously between June of 1972 and December.

MR. KELNER: O.K., all right.

A I believe it was Doctor Nevaizer and I believe it was because another fellow on the ward had to have his leg amputated and somebody said something about mine, and doctor Nevaizer said, told me to forget it.

Q What did this other person about your leg?

MR. KELNER: I think this is all hearsay, your Honor.

1
2 THE COURT: Yes.

3 MR. RUDOFISKY: I will point out, and I will
4 obviously respect your ruling, but we are getting into
5 the area not as to the truth but as to what questions
6 were raised in his mind about the quality of the
7 care he was receiving, and he has testified in a
8 supplemental answer to his deposition that the first
9 time, the first time after he was discharged, that
10 is from Saint Albans, that that is when he realized
11 his leg was not healing satisfactorily and that he
12 said is when I told them about amputation.

13 Your Honor, I think it is a fair question.

14 MR. KELNER: Can you tell me what you are
15 referring to?

16 MR. RUDOFISKY: Well, it is not directly on point
17 but I think it obviously raises the question of
18 whether they spoke to him or whether anybody spoke
19 to him about amputating his leg. This man went into
20 the hospital with a fractured leg and we now come to
21 this tragedy, and I am just saying it goes to the
22 same point, although I am not impeaching him with it,
23 and I'm not asking him the same question that Mr.
24 Kelner did.

25 MR. KELNER: But the time you are talking about

1 was certainly before the amputation of his leg.

2 Now I understand what counsel is referring to --

3 MR. RUDOFSKY: Well, let me say --

4 MR. KELNER: Counsel, let me just finish.

5 What counsel is referring to is a date so late that it
6 couldn't conceivably have any relevancy to the subject
7 of statute of limitations.
8

9 Now, if this relates to before the amputation
10 of his leg, then that would be so far removed from any
11 possible relevancy as to the issue of statute of
12 limitations that I would ask your Honor to sustain
13 objection.

14 THE COURT: Yes.

15 MR. RUDOFSKY: Well, let me explain it this way,
16 your Honor:

17 We have the statement in the deposition that when
18 -- and I am not suggesting that this is going to answer
19 our statute of limitations problem -- but I am saying
20 at least it is the basis for believing that when
21 word or the question of amputation was raised he then
22 began to think about the quality of the care, and what
23 was going on in his head is not necessarily a reasonable
24 man's reaction --

25 MR. KELNER: What year are we talking about?

MR. RUDOFSKY: That is '74.

Now we have an indication in the hospital record and apparently these will be introduced into evidence through the doctors, but I will just state for the record that it is on page 96 of the Veterans Administration hospital.

MR. KELNER: Will you give the year of the entry that you are referring to?

MR. RUDOFSKY: The entry of May 2, 1974, and I will read it.

It says:

"Social work service screening:

"Patient has considerable questions regarding need for amputation which he says was recommended in Castle Point."

Now that brings us back to 1973, that they spoke to him about amputation.

THE WITNESS: Excuse me --

MR. RUDOFSKY: Excuse me.

THE COURT: That brings them back to 1973, but not him.

MR. RUDOFSKY: O.K. Wait.

This continues.

"He plans to fight it all the way, even if it

1
2 means seeking a former orthopedic surgeon from Saint
3 Albans who allegedly stated, "no amputation necessary."

4 Now apparently, and he has just confirmed this,
5 there was a discussion at Saint Albans about amputation.

6 Now I am not suggesting you have to necessarily
7 find for me on this, and Mr. Kelner certainly doesn't
8 have to agree with it, but I think I am entitled to
9 make a record.

10 MR. KELNER: If your Honor please, I have no
11 objection if he is asked, When for the first time he
12 knew or thought of a possibility of amputation, and
13 even assuming the very first day of the injury, June
14 9, 1972 or June 10, '72, someone were to have raised
15 some speculation, I might need an amputation, that would
16 not be equivalent to saying that he has some layman's
17 reasonable knowledge or suspicion that he has been
18 mishandled, which would start the statute of limitations
19 running.

20 So I submit all of this is irrelevant, your Honor.

21 THE COURT: I will take it subject to the Court
22 looking into it and weighing it properly as to its value.

23 MR. KELNER: One more thing for the record, if
24 I may:

25 This is the entry that counsel has just now read

1
2 and that is hearsay and based on speculation on top
3 of another hearsay, it is what somebody allegedly said
4 and we don't even know whether any such remarks were
5 even said to the plaintiff.

6 MR. RUDOFISKY: Well, that may be except
7 the plaintiff has just testified that he had the
8 conversation he things with Doctor Nevaizer, and that
9 Doctor Nevaizer told him that he wouldn't need an
10 amputation.

11 THE WITNESS: It wasn't my amputation, it was
12 the other fellows.

13 MR. RUDOFISKY: Somebody said something about
14 your leg and you asked Doctor Nevaizer whether you
15 were going to need an amputation?

16 THE WITNESS: No, the other fellow, Doctor
17 Nevaizer said he is going to have one, and we tried
18 to talk the other kid out of it and he said, "You
19 are not doing too good yourself, are you going to get
20 better?"

21 We had an argument and that is why we were trying
22 to tell him not to.

23 BY MR. RUDOFISKY:

24 Q That is what I am asking you, let us set it out:
25 The other fellow said to you, "YOU are not doing

1
2 too good"?

3 A Yes, I mean I don't know if that is exactly
4 the right words.

5 Q In words or substance, that is what you under-
6 stood him to say, that is the meaning of what he said?

7 A He said, "Why don't you give it up," or something
8 like that.

9 THE COURT: We are going to recess in a few
10 minutes.

11 MR. RUDOFSKY: Let me just check my notes, Judge,
12 I think I am finished.

13 O.K. Just one last point.

14 BY MR. RUDOFSKY:

15 Q You testified yesterday with respect to a
16 sequence of events in July of 1973 when you felt this sharp
17 pain in your leg right after showering: O.K., do you recall
18 the incident?

19 A Yes.

20 Q Now as I understand it the first Doctor who
21 was responsible for diagnosing your condition at that point,
22 as far as you know, found that there was no fracture: that
23 is the first doctor, right?

24 A Correct.

25 Q And then there came a point a few weeks later

1
2 when a second doctor thought there might be a fracture or
3 there was a fracture, and we will hear from the doctor
4 specifically what they thought, but this is your understanding
5 I think: right?

6 A Yes.

7 Q Now, between the incident when you actually
8 felt the pain in your leg, and I think you went to the
9 nurses station and they sent you back to the room, from
10 the time you got back to your room until the second doctor
11 rendered his opinion, were you allowed to walk around or
12 were you kept in bed, and was your leg -- well, take those
13 two choices to start with: do you follow my question?

14 A I couldn't walk around.

15 Q Excuse me?

16 A I couldn't walk around.

17 Q Did you stay in bed?

18 A Yes.

19 Q Yes, O.K.

20 You were completely off your leg for that entire
21 period as far as you can recall?

22 A I don't recall those two weeks, I don't
23 remember at all.

24 MR. RUDOFSKY: O.K.

25 I have no further questions, your Honor.

MR. KELNER: Your Honor, give me five minutes

and I will complete the whole redirect examination.

THE COURT: We are running until 4:30.

REDIRECT EXAMINATION

BY MR. KELNER:

Q You were asked about, you were referred back to 1972 concerning another patient in a hospital regarding an amputation; do you recall the question that was just asked?

A Yes.

Q Tell the Court all about that, what happened at that time?

A It was a black fellow, another guy, I think he was in the Air Force.

Q A black man?

A A black man, Mike, I think his name was.

He had been there for quite many months, more than myself, and he was going through, he was going through -- well, I don't how many surgeries, his legs were all like my left one, the draft, then he had his legs going -- well, he had his left leg sown onto his right leg and someone --

Q Without going into a lot of detail on it, did all of that conversation concerning a possible amputation

2 1 concern you or that other black patient?

3 A It was him, he told the doctors --

4 Q At that time did anybody at all, did
5 Dr. Nevaizer or anybody in 1972 tell you that you might
6 lose your leg?

7 A On the contrary, they told me the opposite.

8 Q Okay.

9 Now, when for the first time Bob, did you ever
10 become aware that you may have been given improper, careless
11 treatment or negligence of your condition, what year?

12 A It was a couple of months after I spoke to
13 you.

14 Q And what year was that?

15 A 1975.

16 Q Before that, did you ever have anybody tell
17 you, you know, we have neglected you, or did you have in
18 your own mind the thought or think that perhaps you had
19 been neglected or maltreated so that you might have a
20 possible lawsuit before 1975?

21 A No.

22 Q What?

23 A No.

24 Q Okay.

25 Now coming back to your work, just a few questions,

1 and then I will be finished, just before this June 9, 1972
2 accident and you had gotten out of the Marines and you had
3 gotten out of the hospital with the left leg injury and
4 you were working for Vetco --

5
6 A Yes.

7 Q Was there any shortage of work at that time
8 or was it hard to get, jobs, in which you were working and
9 in which you would do electrical work and other veterans
10 would do other kinds of repair work --

11 MR. RUDOFISKY: Your Honor, if the question
12 is was there a problem for him at Vetco, then
13 obviously he can answer that question, but if the
14 question is broader than that --

15 THE COURT: I don't think he is asking that.

16 MR. KELNER: I am asking because of his
17 potentiality for future earnings, even though he
18 wasn't a union man.

19 BY MR. KELNER:

20 Q What kinds of work and jobs were available
21 for each of you young men, each having your own specialty
22 in doing things?

23 MR. RUDOFISKY: Your Honor, there has been
24 no foundation laid for this, I have to object.

25 MR. KELNER: I think we did on direct exam-

ination.

MR. RUDOFISKY: On direct he said that after he came from the service he tried to get a job with Rotbel but they didn't need him and he went to Mebco.

There is no indication that he knew what the status of the economy was any better than any of the rest of us who read the papers.

MR. KELNER: I am not inquiring about the economy, I want to know about the availability to to this company, to this group of young men as to jobs.

MR. RUDOFISKY: If it is as to his company, I have no objection.

MR. KELNER: That is my question.

Q Will you tell us?

A We were constantly working, always working.

Q Was there any shortage of jobs that your company and you could get at that time?

A No, we had turned them down.

Q You turned them down?

A We had to turn some of them down.

Q I don't want to be repetitious, but these were conversions, renovations and repair jobs and the refinishing and things of that sort?

A And refurbishing.

Q And refurbishing?

A Yes.

Q And is it a fact that you were so busy that

you had to turn down jobs at the time when you had this

motorcycle accident?

A Yes.

Q All right.

Now, with regard to the union, you told us yesterday

I believe, and please correct me if I'm wrong, that your

understanding of becoming a journeyman electrician, a

mechanic, would have been after you served five years as

an apprentice; that is what you told us in substance yes-

terday?

A Yes.

Q Now, did you have connection with anybody,

a connection with Rotbel or anybody else who knew you who

was already a full fledged electrician and who was guiding

you in your work, in your training to become a union

electrician?

A Yes.

Q What is the name of that man?

A Mr. Richie Farrell.

Q To your knowledge is he going to be testifying

1
2 in this case as soon as the Court will have time to hear
3 him?

4 A Yes.

5 Q All right.

6 And is he to your knowledge a union electrician?

7 A Right now I don't know.

8 Q All right.

9 We will get that from him, okay.

10 Now counsel asked you and you told him you played
11 checkers, you watch television, you do some reading; are
12 those things based upon how you feel, are they a substitute
13 for all the activities you used to go into before you lost
14 your leg?

15 MR. RUDOFSKY: Your Honor, we will concede
16 that you don't play checkers or watch television
17 as a substitute for camping, so what is the point?

18 MR. KELNER: All right, all right.

19 THE COURT: All right.

20 BY MR. KELNER:

21 Q You mentioned, you were asked whether you
22 had consulted any ministers or any psychiatrists for any
23 advice in relation to your living with your problems?

24 Do you recall these questions being asked of you
25 by counsel?

1

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A Yes.

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6

Q Well, before you were injured, did you have a church or a minister with whom you would or the family would have counseled about family problems, things like that?

7

A All the priests in the neighborhood left.

8

Q I beg your pardon?

9

10

A They changed, everybody changed in the neighborhood.

11

12

Q Before your injury, were you a steady church goer?

13

14

A Pretty regular, I was an alter boy and a pretty regular church goer.

15

Q Where?

16

A At St. Catherine's of Genoa.

17

Q Was your family a fairly religious family?

18

19

20

21

MR. RUDOFISKY: I am not sure what the relevancy is, whether the family is religious, he is an adult, and whether he went to church, I am not even sure of the relevancy of that.

22

BY MR. KELNER:

23

24

Q Since you lost your leg, have you been a steady church goer?

25

A No.

Q You mentioned that you cannot afford a lower floor, a ground floor apartment and that you have an apartment space where you go up one flight; is that correct?

A Yes.

Q And you pay \$125 a month, you said, for that?

A Yes.

Q Have you tried to get anything that is cheaper on a lower floor so you wouldn't have to go upstairs?

A Yes.

Q What have you done?

A How many places have I seen?

Q Yes.

A A dozen.

Q How do you go up the steps, describe it to his Honor.

A There is a bannister on the left side and I hold it with my left arm and I use crutches on my right hand, that is if I have my prosthesis on, I go up with the crutches and the bannister.

Q As you go up, do you go forwards or backwards?

A Forward when I have my prosthesis.

Q What if you don't have your prosthesis?

A I go up on my knees.

1
2 Q What do you mean by that?

3 A I have to wear that elastic Ace bandage and
4 a sock over that so it is cushioned on my knee, I go up
5 on my stump and I try to bring it underneath and in that
6 way I go up.

7 Q How many steps are there?

8 A Thirteen.

9 Q How do you know?

10 A I have climbed them many times.

11 Q You have counted them?

12 A Yes.

13 MR. KELNER: I have no more questions, your
14 Honor.

15 THE COURT: All right, okay.

16 Recess until tomorrow at 10:00 o'clock.

17 (At this point a recess was taken until
18 March 9, at 10:00 A.M.)
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I N D E X

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WITNESS:	DIRECT	CROSS	REDIRECT
ROBERT A. LENNON	8	134	194

* * * *

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK
3

4 -----X
5 ROBERT A. LENNON, :

6 Plaintiff, :

76-C-395

7 -against- :

8 UNITED STATES OF AMERICA, :

9 Defendant. :

10 -----X

11
12 United States Courthouse
13 Brooklyn, N.Y.

14 March 9, 1977
15 10:00 o'clock A.M.

16 B e f o r e :

17 HONORABLE MARK A. COSTANTINO, U.S.D.J.
18
19
20
21
22
23

24 EMANUEL KARR
25 OFFICIAL COURT REPORTER

Appearances:

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JAMES H. DEUTSCH, ESQ.
Attorneys for Plaintiff

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: EDWARD S. RUDOFISKY, ESQ.
Assistant U.S. Attorney

EK/tk

laml

1 THE COURT: All right, gentlemen, case on trial.

2 MR. RUDOFISKY: Your Honor, in reviewing my notes
3 last night, and I have already discussed this with
4 Mr. Kelner, I realized that there was one question that
5 I did not pose to Mr. Lennon and which I wish to pose
6 on cross-examination.

7 Would it be agreeable if I just asked him the
8 question there and the Reporter takes it down?

9 THE COURT: Yes, of course.

10 R O B E R T A . L E N N O N , having been previously
11 duly sworn, continued to testify as follows:

12 CROSS-EXAMINATION

13 BY MR. RUDOFISKY: (cont.)

14 Q Mr. Lennon, do you have any recollection of at
15 any time while you were an out-patient of the Veterans
16 Administration, do you have any recollection of missing
17 appointments for treatment or failing to appear when you were
18 supposed to appear in the clinic or before a doctor to be
19 treated for your right leg?

20 A I don't recall.

21 MR. RUDOFISKY: He says he doesn't recall, your
22 Honor.

23 THE COURT: Okay.

24 MR. RUDOFISKY: Thank you, very much.

25 Thank you, your Honor.

MR. KELNER: Your Honor, I will call Dr. Koven.

D R . L E O K O V E N , called as a witness on behalf
of the plaintiff, having been duly sworn by the Clerk
of the Court, testified as follows:

THE COURT: I don't think you need the mike.

THE WITNESS: No.

DIRECT EXAMINATION

BY MR. KELNER:

Q Dr. Koven, are you a duly licensed and practicing
physician of the State of New York?

A I am.

Q And, Doctor, when were you licensed as a New
York State physician?

A In 1943.

Q And, sir, where did you obtain your medical
education?

A I am a graduate of the New York University
College of Medicine in 1943.

Q And after you were graduated from Medical
College, where did you continue your career?

A I spent nine months as an intern in the Jewish
Hospital, Brooklyn, I was then in the armed forces serving
overseas in the infantry and cavalry for almost more than
two and a half years.

On returning to the United States I became a

resident in the field of medicine known as orthopedic surgery, and completed my residency at the State University of Ohio, having spent approximately three and a half years in training.

Q As an orthopedic surgeon?

A As an orthopedic surgeon.

I then -- Shall I continue?

Q Yes.

A In 1950 I began the practice of orthopedic surgery in Brooklyn, New York, and passed the qualifying examination of the American Board of Orthopedic Surgery, becoming what is known as a diplomate of the American Board of Orthopedic Surgery.

Subsequently I was elected to the various organizations such as the American Academy of Orthopedic Surgery and the American College of Surgeons.

I have continued to practice here in Brooklyn, limiting myself to orthopedic surgery, and have been for the past 15 years -- 14 years, I'm sorry, Chief of the Department of Orthopedic Surgery at the Jewish Hospital, Brooklyn, and also chief of the resident training program there, and I'm also chief of the Department of Orthopedic Surgery at the Long Island College Hospital, and I am on the faculty of the State University of New York at the Downtown State Medical Center here in Brooklyn.

1
2 Q Sir, although we are trying this case before the
3 Court, which is thoroughly experienced in the various aspects
4 of medical practices, and as to the general nature of the
5 various branches, but for the record would you just say what
6 your work has consisted of in surgery, as an orthopedic
7 surgeon?

8 A It consists of the diagnosis and treatment of
9 the diseases and injuries and deformities of the limbs, the
10 upper and lower limbs and the back and neck.

11 Q Have you, sir, during your career diagnosed and
12 treated and performed surgery on fractures of the leg,
13 particularly the tibia and the fibular bones of the leg?

14 A Yes, many times.

15 Q And in connection with that, sir, have you had
16 occasion to become familiar with and experienced and
17 knowledgeable about proper standards of management and
18 treatment of various complications, including infections of
19 such injuries?

20 A I believe so.

21 Q All right.

22 Now, sir, when for the first time did you
23 become acquainted with Robert Lennon, the plaintiff in this
24 case, when did you first examine him?

25 A On June -- I am sorry -- on January,

1
2 January 6, 1977.

3 Q And are you aware, based on your memory, do you
4 know how he came to you, how he happened to come to you?

5 A Yes. I was informed that he had mentioned my
6 name to you or to some member of your office and I believe
7 that through that process your office then, or he himself,
8 I'm not sure which, made the appointment for him to be seen
9 at my office.

10 Q By the way, over the years have you served as a
11 consultant specialist in orthopedic surgery for various
12 institutions or insurance companies or injured individuals in
13 relation to the evaluation of the causations of their
14 conditions and the treatment?

15 A Yes, I have, many times.

16 Q Would you tell his Honor what sum of the
17 consultation work has been in relation to your specialty in
18 the medical practice?

19 A Well, one of the biggest parts, portions of it,
20 that is what I mean, portions of it, is as impartial consultant
21 for the State of New York under, I think it is, Section 13 (D)
22 of the State law, so that the State refers matters where they
23 require an impartial evaluation of the situation, very
24 particularly and predominantly in workmen's compensation
25 matters, but in other matters as well.

I also have been frequently called on by various attorneys in the city to perform this evaluation of disability and injury and occasionally I have been requested to do so by Courts.

Q By the Courts themselves, asking you to render an impartial opinion?

A Occasionally.

Q All right.

Now, Doctor, in connection with this Lennon case, were you supplied by my office with a copy of the hospital records pertaining to his injury and the continued progress of the patient?

A Yes, I was.

Q And did you make a careful analysis of those records?

A I believe I did.

Q And did you examine Mr. Lennon?

A I did.

Q Now, sir, I'm going to ask you to come back with us to June 9, 1972, briefly, what was the history that you obtained both from Mr. Lennon and from your perusal of the hospital records, as to what had happened to him?

A On that day he was involved in an accident, a vehicular accident, and that was at about 5:30 P.M. and he was

1
2 immediately removed to the emergency room of the Brookdale
3 Hospital in Brooklyn , New York.

4 The records indicate that they made a diagnosis
5 of a transverse, that is, a horizontal fracture of the bones
6 of the legs, specifically the tibia and the fibular bones,
7 and that there was displacement of the fragments backward and
8 to the side, technically known as postero-lateral displacement
9

10 The records further indicate that there was some
11 degree of compounding of the fractures, that is, that the
12 bone had penetrated through the skin at some points.

13 Q At what point of the tibia and the fibula of
14 the leg itself was this fracture of these two bones?

15 A Approximately in the mid-shaft, or just a bit
16 above the middle of the shaft.

17 Q At approximately the point between the knee
18 and the ankle?

19 A Just about above.

20 MR. KELNER: I am leading here, if there is no
21 objection.

22 Q This was a complete break of these two bones;
23 is that correct?

24 A Yes, completely broken.

25 Q And a transverse fracture means across?

A Horizontally, yes.

1
2 MR. KELNER: If your Honor pleases, I have the
3 X-rays here and I would be glad to display them, but
4 I doubt if it is essential.

5 THE COURT: No, I don't think so.

6 MR. KELNER: However, if your Honor --

7 THE COURT: I really don't have to look at them,
8 I understand.

9 MR. KELNER: I think it would save time, but if
10 counsel thinks it is necessary, then I will be glad to
11 put them before your Honor.

12 THE COURT: If I get confused, I will let you
13 know.

14 MR. KELNER: I beg your pardon?

15 THE COURT: I said, if I get confused, I will
16 let you know.

17 MR. KELNER: I doubt that you will, Judge.

18 Q Doctor, first were you aware that he was first
19 taken to the Brookdale Hospital and then on the same day,
20 within five hours, transported by ambulance to the St. Albans
21 Naval Hospital: were you told that?

22 A Yes, I believe the record indicates that about
23 10:30 that evening he was admitted to St. Albans.

24 Q In the management of this fracture, what was done,
25 and this is the first day or the day thereafter --

1
2 A In the management --

3 MR. RUDOFISKY: Are you asking what was done at
4 the Brookdale or at St. Albans or both?

5 MR. KELNER: Well --

6 Q Doctor, I'm asking you to assume that there was
7 no operation performed at the Brookdale Hospital -- and I am
8 just jumping ahead five hours or so, and I am going to ask you
9 to assume that the record shows, and we will put them and mark
10 them in evidence, that the record shows that he was admitted
11 to the St. Albans Hospital that evening, June 9, 1972, and
12 that he remained there as an in-patient until September 25, 1972
13 and that an operation was performed upon him on June 9, 1972;
14 now, does that accord with the history that you obtained?

15 A With one addition, that there was a second
16 fracture noted on the admission to St. Albans Hospital, that is,
17 that he also had a fracture of the upper end of the tibia
18 which extended into the knee, which was not significant.

19 (continued next page)
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lam2² Q And that was noted on the admission to St. Albans?

3 A Yes.

4 Q All right.

5 Then was there an operation performed on him,
6 Doctor?

7 A Yes.

8 Q Just briefly, give us a layman's description of
9 it, if you can.

10 A Under general anaesthesia in the operating room,
11 of course, an incision was made and what is known as a
12 Lottes nail was inserted into the medulary that is within the
13 upper marrow of the tibia, in other words, a Lottes nail was
14 inserted, joining through the marrow cavity the upper to the
15 lower fragments of the tibia and thereby immobilizing or
16 stabilizing it, if you will, as if it were skewered.

17 Q Now, Doctor, in your practice and during all the
18 years of your specialization in orthopedic surgery, have you
19 encountered and actually performed such surgery on such types
20 of injuries?

21 A Yes, I have.

22 Q Is it a fairly common occurrence to find injured
23 individuals having such types of transverse fractures of the
24 type that we have in this case?

25 A Yes, it is.

Q And have you yourself managed many patients who have had such types of injuries?

A Yes, I have.

Q Was there anything particularly extraordinary or severe or complicated about the handling of this particular case as of that time, June 9, 1972, in relation to the type of injury this was?

A No.

MR. RUDOFISKY: Your Honor, I don't think that Mr. Kelner said that the way he meant it.

You asked if there was anything particularly extraordinary or severe about the handling of this --

MR. KELNER: Yes.

MR. RUDOFISKY: Do you mean whether there was anything extraordinary or severe about the injury or the handling of the injury?

MR. KELNER: May I rephrase it for counsel's preference?

Q Doctor, with regards to the complexity or simplicity of handling this particular injury, what would you say, based on your experience and after having viewed the X-rays and reviewed the hospital records?

A I would characterize it as a routine type of a case, not an unusual type of a fracture, and that it was

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2 handled in the usual and routine manner, although there are
3 other ways of handling this, but it is an acceptable way of
4 managing that type of fracture.

5 Q So the insertion of this metal rod in the right
6 leg, as far as that was concerned, was done in a routine and
7 an approved manner?

8 A Yes, it was.

9 Q Now, sir, will you just, following your own notes
10 which you made and based upon your examination of the
11 hospital records, will you tell us what then occurred of any
12 significance in the course of his recuperation?

13 A He had a fairly routine, relatively uncomplicated
14 course following the operation.

15 There was this cast change specifically on
16 June 13th, at which time the cast was removed except for that
17 portion below the knee, that is the cast had originally
18 extended above the knee after the operation and then changed
19 to what is called a below-knee cast, for the purpose of putting
20 a fracture pin, that is, a pin into the upper end of the tibia
21 in order to apply linear force, pulling, and this was done not
22 for the fracture that we have had under description, that is
23 the transverse fracture of the shaft, it was done for that
24 second fracture on the upper end that was going into, towards
25 the knee joint, and to permit some motion of the knee, that is

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2 as far as I could understand from the records, and then there
3 was no further complication that I know of.

4 Then on the 23rd of June, the stitches were
5 removed, the cast was, I believe, removed and a splint was
6 applied, and at that time some numbness of the foot was noted
7 with some weakness of the foot.

8 Q Do you have an opinion as to what the cause of
9 that numbness was?

10 A The numbness and weakness in my opinion was due
11 to some pressure over what is called the perineal nerve, which
12 is near the knee. It could have come from many causes, but
13 which particular one I don't know. But it was noted on that
14 date by the examining physician.

15 Q Was that, in light of the entire picture of what
16 happened later, significant or can we just cast that aside?

17 A I would say in view of the fact that we are not
18 dealing currently with the remaining foot, I think it can be
19 dismissed.

20 Q All right.

21 Now, what happened after that of any significance
22 so far as your analysis of the records and the history were
23 concerned?

24 A Yes. On June 29th, the records would indicate
25 from the doctors' notes, that there was an area over what he

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2 calls the wound, and I am not sure exactly what that was, but
3 he calls it the wound, whether he meant the surgical wound or
4 not I am not certain, at any rate it was an area in the leg,
5 that it had approximately a four and a half -- well, I'm
6 sorry, a four to five centimeter by one to two centimeter
7 slough. I will explain what that means.

8 That is something between an area of approximately
9 two inches by a half to one inch, approximately what I am
10 indicating here (Indicating with hand).

11 Now, a slough means a discharge of tissue. The
12 tissue was dead, the overlying tissue was dead.

13 There was not, to my best reading of the record,
14 there was no culture taken, that is, there was no determination
15 of whether or not this was bacterial contamination, which
16 usually is found in the dead area of skin and soft tissue.

17 No particular attempt was made, therefore, to
18 find what was the cause or the significance of the slough.

19 Plus, the treatment consisted to my knowledge
20 and recollection of the record only of the use of soaks, that
21 is, the keeping of the slough wet --

22 Q Can I interrupt you, Doctor:

23 You mentioned the word "slough," for a layman's
24 understanding does that mean the deadening of the normal
25 tissue or the wasting away?

1 Just how would you describe it so we can
2 understand that as laymen?

3 A It is dead, it is an area of dead soft tissue
4 which extended from the skin downwards. The depth is not
5 given in the record and you might call it, in terms that might
6 be easier for you to handle, an ulcer, an ulceration.

7 Q Now, what was the significance of that,
8 medically, Doctor?

9 A That should have alerted careful attention to
10 the possibility of an underlying infection, although it is not
11 proof of an underlying infection, but once you look at it, you
12 should look at it from this possibility.

13 Q You mentioned the word culture or culture
14 sensitivity, would you please explain?

15 A Well, a sterile tube or plate is taken and a
16 sterile object, well, usually a smear is drawn across the
17 ulcer, the slough, and then it is put into what we call a
18 culture media to grow bacteria so they can be identified for
19 two purposes:

20 One, which specific bacteria they are;

21 Two, what specific antibodies particularly would
22 be most effective against it.

23 Q Would it be essential to this culture testing
24 to determine what the bacteria or organisms are because you
25

1
2 could then follow with an antibiotic to combat that infection
3 caused by a particular bacterial organism?

4 A Exactly.

5 Q Was that done here on June 29th when that
6 sloughing was noted in the records?

7 A To my reading of the records, it was not done.

8 Q It was not done?

9 Now, Doctor, before we go further, I would ask
10 you whether under proper standards and procedures of hospitals
11 and medical administration, is it essential that every
12 significant event in the way of treatment or every event in
13 the way of the patient's condition should be written into the
14 record?

15 A It is usual and customary that all significant
16 events be described.

17 Q Does proper procedure require that all
18 significant entries should be recorded in writing in the
19 record?

20 A In my opinion, it does.

21 Q And the absence of any notations concerning a
22 culture test being done regarding this sloughin on June 29, 1972,
23 based upon your opinion that they did no culture tests
24 regarding that sloughing?

25 A That is my opinion.

evidence at this time the various original hospital records produced pursuant to subpoena.

Would you step forth , Mr. Rudofsky?

THE COURT: All right, mark them in evidence.

MR. KELNER: Shall we mark these separately by admission dates, your Honor?

THE COURT: Yes.

MR. KELNER: First I would like to offer in evidence a hospital record of the St. Albans Naval Hospital pertaining to the admission, as they call it, of June 10th -- it should be June 9th, pertaining to June 10, 1972 to September 25, 1972.

The reason for that discrepancy, your Honor, between June 9th and June 10, 1972 is perhaps they made the card out after midnight, we don't know.

THE COURT: I would think so.

MR. RUDOFISKY: No objection.

MR. KELNER: May we have this first one marked in evidence?

THE COURT: That will be plaintiff's exhibit 1.

THE CLERK: Hospital record marked in evidence as plaintiff's exhibit 1.

MR. KELNER: And, sir, I think I will save time if I mark the others at this time.

1
2 Q Okay.

3 And is that your own individual opinion or is
4 that generally, right through the whole medical profession,
5 accepted as the proper procedure that you must write down
6 these things if you do a particular procedure, otherwise the
7 assumption is that it has not been done?

8 A Yes.

9 Q Is that correct?

10 A Yes.

11 Q Now, what is the next significant entry --
12 Well, this was June 29, 1972, 20 days after the original
13 injury in this vehicular accident; is that correct?

14 A Yes.

15 Q What is the next significant entry you find
16 there, Doctor?

17 A The notes are rather scanty throughout, but the
18 only significant entry I find thereafter is some days later
19 when on July 6th of 1972 the physician -- I can read the
20 exact note but my --

21 Q Would you do that?

22 A These are my notes of what his notes say:
23 Well, I think it is important enough to be
24 exact.

25 MR. KELNER: I think we ought to offer into

1
2 May I now offer as plaintiff's exhibit number 2
3 in evidence the hospitalization, in the same hospital,
4 September 18, 1972 to October 24, 1972?

5 MR. RUDOFISKY: No objection.

6 THE CLERK: Hospital record marked in evidence
7 as plaintiff's exhibit number 2.

8 MR. KELNER: The next is the hospitalization,
9 same hospital, November 15, 1972 to December 29, 1972.

10 MR. RUDOFISKY: No objection.

11 THE CLERK: Hospital record marked in evidence
12 as plaintiff's exhibit number 3.

13 MR. KELNER: The next is an out-patient record
14 of the same naval hospital, St. Albans, out-patient,
15 on May 28, 1973.

16 MR. RUDOFISKY: Mark the folder.

17 THE CLERK: Hospital records marked in evidence
18 as plaintiff's exhibit number 4.

19 MR. KELNER: If your Honor pleases, I would like
20 to offer all of this material, which is all of the rest
21 of the Veterans Administration records and some
22 ancillary papers that were delivered with them, with
23 the proviso, sir, that I've not had an opportunity to
24 go through this very very thick record and may I reserve
25 the right to object to any matters which your Honor may

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2 later exclude on the basis of evidentiary rules?

3 THE COURT: All right.

4 MR. KILNER: I would like to offer it all as one
5 collective exhibit, your Honor.

6 THE COURT: Mark it in evidence.

7 THE CLERK: Veterans Administration hospital
8 records marked in evidence as plaintiff's exhibit 5

9 Q Now, Doctor, referring back to July 6, 1972,
10 sir, what was the significant note that you mentioned in the
11 record?

12 A May I make one correction?

13 There is also a note on July 5th which I believe
14 is a part of the July 6th itself.

15 Q Would you feel free to tell us about that, also?

16 A Okay. As I indicated previously, subsequent to
17 the discovery of the ulcer on June 29th, there are no notes
18 until July 5th, I think I said July 6th.

19 Q When you say there are no notes, do you mean any
20 notes indicating any culture tests being done?

21 A There are no notes of a culture test, there is
22 no report of one, plus there are no clinical notes from any
23 physician.

24 Q Which indicates what, Doctor, so far as the
25 management of this infection was concerned?

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3 MR. KELNER: Your Honor, I will object to the
4 characterization of this as an infection.

5 The doctor testified that it didn't necessarily
6 indicate infection, but just that it would have been
7 the better practice to check.

8 MR. KELNER: Very well.

9 Q What notes, you have July 5, 1972?

10 A Yes.

11 On July 5th it says, "Area demarcated."

12 That is that it had spread further but had stopped
13 at some point in that eight day period, that is, or the
14 seven day period, and it stopped spreading and had sharply
15 defined edges.

16 In his notes there are the words, "debride -
17 in near future."

18 That means that in the near future I am going to
19 cut away this dead skin.

20 Then on July 6th, the same handwriting, as far
21 as I can tell, in the doctor's progress notes it says:

22 "Dead skin debrided."

23 That is the dead skin was removed.

24 The next note, continuing:

25 "Pus pocket evacuated."

Q "Pus pocket evacuated"?

1
2 A "Pus pocket evacuated antero-medially," that
3 is the front and the interior side of the leg through the
4 wound, and I would assume that the evacuation of the pus was
5 carried out through the area that they had debrided because
6 that is what is called the wound.

7 The next note is:

8 "Acetic acid dressing started."

9 That is signed by a name but I cannot interpret it.

10 Q All right.

11 Now, Doctor, what is the significance of those
12 notes to you as a medical specialist in this field, the
13 July 5th and July 6, 1972 notes?

14 A Well, he is describing something that he did at
15 the bedside because there is no other operative records. It
16 is simply something that you just don't do at bedside.

17 Q What was that condition, medically speaking, the
18 description of the pus and the debridement of this widening
19 area of dead tissue?

20 A He had an abscess, deep, to the dead tissue, he
21 didn't, there is no indication of how deeply it did extend,
22 but it was deeper into it and I believe that to be a deviation
23 from normal practice, that is, in not noting its depth, its
24 penetration. You simply don't do this at a patient's bedside.

25 The proper way to evacuate an abscess is to do it

1
2 thoroughly under ideal conditions with the patient at ease,
3 and this should be done in a sterile room.

4 Q Doctor, do you have an opinion as to whether
5 the presence of that abcess and the pus and to the depth, to
6 the extent you have described, was an infection?

7 A Yes, it was.

8 Q With certainty, is that what you are telling us?

9 A Yes, because on that day a culture was taken --

10 Q Yes, sir?

11 A And it was recorded from the laboratory five
12 days later, although the pus specimen, let's call it, of the
13 pus was received on July 6th, it was recorded on July 11th
14 as containing several different kinds of bacteria, one of
15 which is aero-bacteria, another one is staphylococcus aureus
16 coagulus and the next one is herellea vaginocola.

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Q Doctor, these bacteria are discovered and identified under microscopic studies in the laboratory; is that correct?

A Yes, after they're grown out in the culture media which I described.

Q So that five days later the laboratory reported after the studies that these three different bacteria species had been ascertained under microscopic studies; is that correct?

A They reported that. They also reported which specific antibiotics they were sensitive to.

Q What was done then to manage this infection condition?

A Well --

THE COURT: I have one question that's in my mind at this time.

If you see acid application, was that for the purpose of merely cleansing, or was it for controlling any of the bacteria as far as you know?

THE WITNESS: Acidic acid was, I just think, a non-specific --

THE COURT: In other words, wasn't used --

THE WITNESS: I'm sorry?

THE COURT: I'm asking the question for my own edification. It wasn't used, as far as you can discern,

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2 from the record itself, it wasn't used for any one
3 particular type of bacteria we spoke about -- that you
4 spoke about?

5 THE WITNESS: No, there is one type of bacteria
6 that is susceptible to acidic acid.

7 THE COURT: Is that staphylococcus?

8 THE WITNESS: No, it's usually the proteus,
9 which isn't present here.

10 A (cont.) I'm reading now, going from the clinical
11 sheets to the order sheet. There is no order for an antibiotic
12 on July 6th. He may have been receiving some previously, but
13 I find no record of it in the order sheets here.

14 The last ordered antibiotic that I can find is
15 considerably farther back on June 15th, and/or was given for
16 Kafliex.

17 Q Is that a non-specific antibiotic, also?

18 A No, it's a broad spectrum, but I don't know if
19 it was renewed. I don't know if he was receiving it. The
20 records of administration of drugs are conflicted here because
21 they're not headed in some instances by the month. They are
22 headed by the dates.

23 Q How about after July 6th?

24 A After July 6th there's no record of his
25 receiving any antibiotics. The first specific order of any

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1 type was on July 10th, when the dressings were changed,
2 apparently, from the acidic acid to peroxide and also to
3 Betadine, which is a form of iodine, but it's just a surface
4 application.
5

6 On the first order I see of any antibiotic
7 in the record here, either the order sheet, which is under the
8 doctor's control of the clinical notes, which is -- it's on
9 July 18th when he's given tetracycline, in the order sheet,
10 but that's a considerable time later.

11 Q Doctor, let me interrupt you. The laboratory
12 report came back after the pus and the other condition of
13 July 6th were noted, came back, I think you said, five days
14 later; is that correct?

15 A Yes, there's a stamped date.

16 Now, they're probably available previously -- he
17 previously could have called up or may have called up, but
18 they're not in the chart stamped until July 11th.

19 Q When you have a condition of this nature, does
20 normal, proper practice require even as much as five days to
21 get it back or can it be obtained by telephone to the
22 laboratory and be obtained, within, say, a day or so?

23 A Well, the usual procedure is when you are faced
24 -- I want to use his words, not mine -- going back to the note
25 of July 6th, "pus pocket." When you have pus, particularly in

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2 an area that's subject to an infection such as this operative
3 site, what you do is you start on a broad spectrum antibiotic;
4 could be ampicillin, any one of a number.

5 I see no starting of that here in the record.

6 Then you call up for laboratory in 48 hours.

7 You don't wait for a report to come up on the chart, but you
8 usually, within a 48 hour interval, call the laboratory and
9 see if they've got anything growing out of any information.

10 In most instances, in 48 hours, they have some
11 type of either final, or at least an interim report which
12 can assist you. That's the usual procedure.

13 Q Five days after that, when they did come back
14 with an identification of the three bacteria, are you telling
15 us even after that there was no institution of specific
16 antibiotics to manage those three stated bacteria or organism
17 sources?

18 A Yes.

19 Q Is that correct?

20 A Yes, I'm looking at the record. I find no
21 specific antibiotic was ordered and the specific one that was
22 indicated by the sensitivity tests in their records was
23 tetracycline, and that was delayed for a week as far as the
24 records indicate.

25 Q What about the tetracycline, would that be an

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3 adequate antibiotic therapy to manage all three of these
4 different organisms?

5 A Well, it was adequate for the herella.

6 Q Would you spell that for the record?

7 A H-e-r-e-l-l-a, it was adequate for the aerobacter,
8 as far as the third one goes, the staphylococcus since, at this
9 time, and it's a technical chart. I don't want to confuse the
10 issue, coagulates negative, unimportant, that means it's not a
11 factor.

12 The two important bacteria were sensitive to
13 tetracycline.

14 Q What was the next significant event as far as
15 his progress was concerned, Doctor, after this delay --
16 withdrawn.

17 Doctor, based upon your experience and your
18 knowledge, was it in conformity with proper medical practice
19 to have delayed the institution of antibiotic therapy up to
20 the date you gave us?

21 A No, it was not.

22 Q What would the effect of that be in a situation
23 like this, this delay which you say is not in conformity with
24 proper practice?

25 A I can't totally accept the answer in isolation.
It would be a combination of the effect of a delay, plus the

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2 absence of knowledge as to whether the entire area of infected
3 tissue had been removed at the bedside, which in my
4 experience would be highly unlikely. It's a combination of
5 these two factors, would lead to an answer that the patient's
6 limb would be threatened in this respect.

7 We're now setting up an area in which there would
8 be an extension, further extension of the infection, a
9 worsening of the infection, not only in distance, in space,
10 but in concentration; that is, in intensity.

11 Q Doctor, does the record show that he was placed
12 in isolation?

13 A I think at a considerably later date. I don't
14 think so at that time.

15 Q I'm going to ask you to assume that during this
16 hospitalization there's been testimony by Mr. Lennon that the
17 odor from the wound area became so pungent or strong that he
18 was removed from the presence of other --

19 MR. RUDOPSKY: Objection, there's no such
20 testimony in the record.

21 MR. KELNER: I'm going to ask your Honor to
22 assume he did testify so --

23 MR. RUDOPSKY: There was testimony he was placed
24 in isolation. He didn't remember the dates. The dates
25 are ascertainable from the medical records. There's

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absolutely no testimony --

THE COURT: I know he said something about it.

MR. RUDOFISKY: Let me state my understanding.

MR. KELNER: I'll withdraw it for the present just to save time, your Honor. I would rather not get into it now.

Q Doctor, with regard to the management of this sloughing and the pus condition, in addition to the institution of antibiotic therapy, after culture tests, was there anything else, in your opinion, that should have been done with regard to drainage, irrigation, or any other approaches to managing the infection at that time?

MR. RUDOFISKY: I'm going to object to that question as leading. We're getting to the heart of the issue here, obviously.

THE COURT: Rephrase it.

MR. RUDOFISKY: He's not giving the answers he wants.

MR. KELNER: This being non-jury, I don't think that would be terribly important, but very well, I'll rephrase the question.

Q Doctor, was there anything else that should, in your opinion, based upon proper medical practice, should have been instituted when the condition was discovered June 5th --

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July 5th, July 6th and thereafter?

A I think it should have been inspected under proper conditions at that time, all dead tissue should have been removed and depending upon the depth of the infection, he may have required a further surgery, but that would be speculative since it didn't go deeply, in my opinion.

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Q What is the next significant event that took place as far as the record is concerned?

A On July 13th, as I say, at this point, there would still be no specific treatment that I know of. The note says that the bone is visible in the cavity. In other words, the death of the overlying tissue, at least, has destroyed everything overlying the bone.

The next part, he notes, continuing says, "no granulation of tissue near bone at all." That is, there is no healing, granulation is healing, no evidence of any healing near the bone.

The next -- that's on July 13th. On July 17th, apparently, X-rays had been taken and the doctor reports no bony change on X-ray, but the next sentence is important in my opinion:

"Pus continues medially," that is, he is draining pus from an area where there is exposed bone and no evidence of healing, no record that I can determine of specific treatment --

Q What were they doing with him during all that time

A Well --

Q Based upon the records.

A Up to that time, July -- I believe I stated on July 18th they began antibiotics, but up to July 17th, the only thing I know of is the use of soaks, which is surface

wetting, prevents the surface from drying up.

Q Would that be adequate to combat the infection, having soaks on the surface of the wound?

A Not in and of itself, in my opinion.

Q Go ahead.

A Then on July 20th, the only -- the only note and next note I see is same signature, "Will graft next week."

Q What does that mean?

A I assume that he means that the following week a skin graft will be used to cover the area of destroyed tissue.

Q Proceed, Doctor.

Q Then on July 21st, the following day, note says: "Wound much cleaner, grafting soon."

Then no note until the July 27th date when it says: "OR-A."

I think that means to the operating room in the morning.

Then on July 28th he is removed to the operating room.

Q What was done?

A Let's find the operative report, to be very exact.

The pre-operative diagnosis is status post open reduction and internal fixation, right fractured tibia with

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2 loss of skin and soft tissue over anterior portion of tibia
3 with dead bone exposed without periosteum.

4 That means there's dead bone visible and there's
5 no covering. Periosteum is the covering overlying. It's been
6 destroyed.

7 Then, if I may read from the procedure --

8 Q You're now reading from the hospital record,
9 plaintiff's exhibit 1?

10 A Yes.

11 The patient was prepared and draped in the
12 usual manner, the right tibia wound was explored and several
13 areas of pus were identified. Since he's exploring the tibia
14 wound, I assume the pus is in the tibia and the wound was
15 opened in order for this to be drained completely. The bone
16 which was dead was cleared away with a hall drill through
17 bleeding bone.

18 Q What does that mean, Doctor?

19 A That he was attempting to drill the dead bone.
20 That's the only interpretation I can put on this.

21 Q Was that proper procedure, based upon your
22 experience, to try to clean out dead bone with a drill?

23 A No, that's not the way it's done, in my
24 experience, nor do I know anybody that does it that way. The
25 usual way is to define a clean, healthy uninfected viable living

1
2 area of bone at the margin and to make a cut with a cutting
3 instrument, not with a drill instrument, with a cutting
4 instrument through clean bone, circumferentially and the dead
5 infected bone and to remove the entire thing. This procedure,
6 which is standard and which is the only procedure I know for
7 an infected bone that's described for current use is called a
8 saucerization.

9 Q It has --

10 A It has the word "saucer." You saucerize, so
11 you have a flat, open accessible, clean area of bone. You
12 don't take dead bone and just drill it and leave the drilling
13 pieces in or you don't drill at all. Drilling won't remove it.

14 Q Is that what they did here?

15 A That's the description. A Hall drill through
16 leading bone. That's the only thing I know they did.

17 Q Right?

18 A Then the next section of the report says, "the
19 skin edges were excised," which is acceptable procedure as
20 far as I know.

21 The next step is "using a Reis Dermaton," a
22 graft, referring to a skin graft, 14/1000s of an inch thick
23 was taken from the right thigh, measured, and then placed over
24 this at inter-cavity down to the bone.

25 Q Let me interrupt you, Doctor.

Koven - direct

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Was that proper procedure under these conditions, drilling into the dead bone and then covering that with skin taken from his hip?

A No, absolutely not.

Q Why?

A You don't take dead tissue skin graft unlike a live skin graft. This is a free piece -- very thin, free piece of skin removed from the thigh and then place such dead skin over areas of dead bone for the simple reason that dead-to-dead cannot unite. You can take a dead piece of skin to a healthy area of muscle, for example, it will take through the absorbing in a way, the circulatory supply of the muscle.

However, to take dead skin and place it over dead bone or for technical reasons over live bone, but particularly over dead bone, it virtually dooms it to failure. The margins where they may contact some soft tissues may take, but the central portion will not take.

Furthermore, although this graft was later stated to have been measured, the word he uses is "meshed." This prevents proper drainage. In order to treat this properly and I think it's a standard used by everybody I'm aware of, what you have to do is to insert two tubes. This is known as the suction drainage method. I think it's standard throughout the country. One tube you drip in an antibiotic or

1 antibiotics, diluted in fluid in a continuous drip.

2 The other tube comes out and is attached to a
3 suction pump so there's a continuing circulation drawing off
4 of whatever material may be there. There is a suction drip
5 method that's used almost invariably in the presence of an
6 osteomyelitis, which is an infection of bone, which is what's
7 being described in his own words, his words, of pus and dead
8 bone. That's the same thing as saying osteomyelitis.

9 Q Are you saying that as of July 29th, when this
10 skin grafting procedure was done, there was already
11 osteomyelitis there?

12 A Yes, the description of right tibial wound
13 explored, then the word "pus," and then "dead bone", this is
14 osteomyelitis is. It's a dead, infected bone.

15 Q Based upon everything you've told us, since
16 July 6th, do you have an opinion as to what was the cause of
17 this condition of osteomyelitis being there, Doctor?

18 A Well, the area had, in some way, been contaminated
19 at some time during his -- subsequent to his having sustained
20 the fracture and that the bacterial contamination had invaded
21 the bone, had formed an infection, pus, producing bone-
22 destroying infection, all emanating from the contamination
23 with the bacterial organism.

24 Q Based upon all you've told us up to this point,
25

1
2 had they, at the hospital, followed proper standard medical
3 procedure in treating this infection when it was discovered,
4 all the way up to July 29th?

5 A No, they had not.

6 I believe the date of the operation is July 28th,
7 if I'm not mistaken.

8 Q I think it's July 29th.

9 Now, Doctor, you had mentioned this suction --

10 A It says, "July 28th."

11 Q July 28th?

12 A Yes.

13 Q I'm sorry.

14 You had mentioned the suction and drainage method
15 as being the proper standard to follow under such conditions
16 when you're even attempting to do the skin graft; is that correct?

17 A That's the standard procedure.

18 Q Was it done here?

19 A No, it was not.

20 Q Do you have an opinion as to whether the failure
21 to install the suction and drainage equipment, these tubes you
22 talked about, bathing it with antibiotic solutions, whether
23 that was in conformity with proper practice, the failure to do
24 that?

25 A It was not in conformity with usual and customary

-- what I personally would consider to be proper practice.

Q Under the conditions that they covered this dead bone, without the drainage and suction equipment, they closed it all up over the dead bone. Was that entire procedure in conformity with proper practice, in the medical profession?

A No, plus the failure to remove the dead bone.

Q All right, you had already told us that.

A I'm sorry.

Q What happened after that operation was performed Doctor, according to the record?

A On the next note -- there are no notes for three days from the record I've been handed, no notes for three days

On July 31st there's a note saying that the skin graft has taken nicely so far in the upper portion, but -- then a dash, then lower bone -- lower base, I'm sorry, lower base is not adhering.

In other words, the lower half of the graft, which I assume to be the half overlying the bony part is not taking.

Then, on the following day, on August 1st, to be exact, the same -- there's another note. It says, "saline dressings started."

In other words, they had not -- they hadn't even kept the surface wetted down to prevent the surface from

1
2 crusting. They first started at that time and pus was noted
3 over the bone.

4 Q On what date?

5 A August 1st. Apparently the graft was not
6 covering the bone any more. I assume it had been destroyed or
7 dried out in part and that pus was then apparent, again,
8 overlying the bone.

9 Q Doctor, based upon the procedure that they did
10 follow of covering the dead bone, using a drill into the dead
11 bone instead of removing it, with the cutting instrument which
12 you said is the only way it should be done, the failure to
13 institute suction and drainage which you said is the thing that
14 is supposed to be done, the procedure that should be done, do
15 you have an opinion as to why this skin graft did not take?

16 A I think it's predicated on my original statement
17 that you never would graft a piece of dead skin over an area
18 of dead bone. It's just built-in failure.

19 Q When the pus then was found on August 1st at
20 about four days or so after the skin grafting operation was
21 done, is that something that is consistent with the opinions
22 you've given us; namely, that the infection process is
continuing and the skin graft has not taken?

23 A Yes.

24 Q Just, without going through all the records,
25

1
2 Doctor, just to simplify it, is it a fact that this infection
3 continued and continued and continued thereafter?
4

5 A It continued, to my knowledge, because --

6 Q Is there a note of September 1, 19 -- I'm trying
7 to avoid reading every entry.

8 A On September 1st it says, "Probably infected --"
9 something "with drainage from wound and two areas below."

10 In other words, there's certainly drainage,
11 infection, continuing from the wound into new areas below.

12 Q So that, Doctor, is it fair to say --

13 A This is September 1st.

14 Q If one were to take all the time necessary to
15 read all the notes, this infection then began, did continue to
16 spread?

17 A It spread further, apparently, from what I read
18 of the notes.

19 Q Coming up to -- are there any other significant
20 events that you would like to tell the Court about up to
21 September, 1972, or is it largely repetitious?

22 A When he finds the new areas, two new areas of
23 drainage are noted, on September 1st, then there isn't a single
24 note here for sixteen days. I don't know what's happened to
25 those new areas.

Q I beg your pardon?

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A I don't know what's happened to the new areas of drainage.

Q Didn't they take any further culture tests when that note is entered on September 1, 1972 --

MR. KELNER: Or will counsel concede there's not a single entry of any further cultures sensitivity tests taken during that period of time?

MR. RUDOFISKY: I'm not aware of one, your Honor, but I certainly would defer to whatever is in the record.

A No cultures sensitivity -- excuse me, I think I can assist you.

Unless I'm not -- the last culture and sensitivity I find is on July 20th, six weeks previously.

(continued next page)

1
2 DIRECT EXAMINATIONT 3 am 3 BY MR. KELNER (Cont'd):
R 1

CR/bw 4 Q And then all the way to December?

5 A Well, he was discharged from the hospital in
6 September 25th.7 Q What was his condition then, if you can tell
8 us from the records?9 A Can't tell from the recording excepting that he
10 was discharged wearing a cast and there is no note on it --
11 after September 1st. The next 25 days there is no note of the
12 status of the infection. Except -- on the 16th it says
13 drainage improving or drainage less. But that is the only
14 interval note.15 Q I'm going to ask you to assume that Mr. Lennon
16 testified before the court yesterday, that when he was permitted
17 to leave the hospital at various times, that he was told that
18 he could -- he could use -- I think it was -- was it peroxide?
19 Peroxide, Q-tips, that he could change dressings himself under
20 instructions given to him at the hospital when he would leave
21 the hospital. Was that in conformity with proper management
22 and proper medical practice, to permit a patient to do that
23 under the conditions I've just described?24 A No, for this reason: That in the face of an
25 active -- what appears to me extending infection, you certainly

1 would not change dressings except under sterile precautions
2 which I don't believe Mr. Lennon would be capable of doing.
3 In other words, you'd have to know how to put on a pair of
4 sterile rubber gloves and how to open sterile packages of gauze
5 and to clean properly. I don't think it is up to the patient
6 in the face of that type of an infection or condition to -- I
7 may be getting twisted up in the sense, but I don't think that
8 a patient should be permitted to perform these type dressing
9 change.
10

11 Q Now, will you proceed --

12 A Because of the danger of further contamination.

13 Q Very well, sir. Now, doctor, coming back
14 after -- from September to December, are there any significant
15 entries that you feel would be helpful to the court in under-
16 standing his further progress?

17 A Yes. He was apparently readmitted to the hospital
18 from September 18th, '72, and remained to October 24, '72. And
19 on that admission --

20 Q Doctor, are you familiar with the fact that even
21 in the hospital the plaintiff, Mr. Lennon, was permitted to
22 do -- to soak the injured area or the wounded area and I'm
23 referring to entry of July 8, 1972, and the nurse's notes, if
24 you'd be good enough to find that? And another entry --

25 Q What was the date, sir?

1
2 Q July 8, 1972, nurse's notes.

3 MR. KELNER: And may I read from the record,
4 your Honor? I'm looking at a photostatic copy of it.
5 I'm working from my copy while the doctor has the
6 original.

7 Q An entry stating self A.M. care without assistance
8 the letters -- R.G., it looks like?

9 A Regular diet.

10 Q Regular diet, well. Would you read it, doctor?

11 A Well, "wet to dry acetic acid, one percent soak
12 supplied by patient." That is on July 8th.

13 Q Yes.

14 A I think the --

15 Q Another entry --

16 A Excuse me. I think we established the fact that
17 they certainly had recognized the infection just two days
18 previously, on July 6th. Although it may have been present
19 as early as June 29th.

20 Q An entry dated August 2nd, which is after the
21 laboratory report that you earlier mentioned. Would you read
22 that note on the nurse's notes?

23 A Yes.

24 Q The top of the page.

25 A Oh, the next page then. "Several dresses changed.

1 Complains of pain and itching," so forth.

2 Q My question to you, doctor, on those entries,
3 did it conform to proper hospital and medical practice, to
4 allow a patient with this sort of an infection and progressive
5 infection under these conditions, to be performing self help
6 and doing the things that are described in that record?
7

8 A I don't believe that a patient should be allowed
9 to change his own dressings under these conditions.

10 Q Why not?

11 A Because it leads to a -- an unsterile technique,
12 which cannot really be taught, and sterile technique that is
13 cannot really be taught, and permits the possibility of further
14 contamination of the wound.

15 Q Doctor, coming down then, up to December, are
16 there any other significant entries that you feel would be
17 helpful to us in evaluating the progress?

18 A Yes. As I stated, on September 18th, he was
19 readmitted to St. Albans and remained there until October 24,
20 about five weeks.

21 Q Is there an entry -- I think September 18th, --
22 that there was pus found and that he was placed into isolation?

23 A Let's see. "Patient put in quiet room and
24 isolated with gloves, masks, gowns and hand wash before entering
25 the room." That is, nobody could come into that room without

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sterile gloves -- without washing his hands, putting on sterile gloves, wearing a mask and wearing a sterile gown. By all persons.

Q Right. Okay. Will you proceed from there, doctor?

A Yes. Now, -- I'm sorry, your Honor.

THE COURT: Take your time.

A Down where the clinical records are?

THE COURT: Can we take a short recess at this time? Just take a short recess.

THE WITNESS: Can I speak, your Honor?

THE COURT: Not about this.

THE WITNESS: Well, all right. But off the record?

THE COURT: All right. Go ahead.

(Discussion off the record)

(Recess taken)

BY MR. KELNER (Cont'd):

Q Doctor, I think we were at a point of September, October and November. Would you just select whatever highlights you made from your notes or from the record to indicate to the court what the progress and events were?

A My notes would move it a little quicker, I think. He was admitted and there was some -- the edge of the graft

1 because there was still some supposed bone were taken and on
2 admission they used the word there was some fluctuants
3 which means underlying liquid pus. At -- just beneath the
4 wound. And this actually proved to contain pus as indicated
5 by the record.
6

7 Then to go on, it says --- stated that it was
8 their impression that he had an infection and a non-union, the
9 bone was not uniting and it was infected. And he was placed
10 again in an isolation room or he was placed in an isolation
11 room and oral antibiotics were given.

12 There are not culture reports that I could find
13 in this chart. In other words, I couldn't find anywhere in
14 the chart where they had taken a culture of the wound. They
15 did -- the only -- only cultures of his urine but none that I
16 could find of his wound.

17 Q Would that be conforming to proper practice, not
18 to take culture of these wounds?

19 A There for five weeks. He has pus according to
20 them and not to reculture to see if they're on the right track
21 with the antibiotics at least would be improper, in this point.
22 In fact, during this whole period of time I don't know that
23 any specific treatment, very specific treatment was rendered.
24 He didn't have a removal of the dead tissue. He didn't have
25 the suction drainage or any of the things I had suggest

1 previously.

2
3 Now, I don't know what condition he was on
4 discharge because the last note is -- of the doctor is dated
5 October 17th. He was discharged on October 24th. The -- a
6 new cast had been applied on the 17th, which they did state
7 that the wound was relatively clean. No, I'm sorry. Says
8 "the wound's the same, same. Will try long leg cast with
9 walking." That is the last note. Then he's discharged a
10 week later.

11 Q When it says "the same," referring to the
12 previously entered notes, where he had pus?

13 A He had pus and then later point it says wound's
14 relatively clean. I don't quite follow, but ---

15 Q Relatively clean, what does that mean medically?

16 A Relatively is a vague term. I wouldn't want to
17 define it myself.

18 Q All right.

19 A Then he's readmitted after the discharge on
20 October 24. He's readmitted to the same institution on
21 November 14, '72, where he says for six weeks, until Decem-
22 ber 29th. Now, at that admission, on the admission he had
23 drainage of pus coming out of the upper portion of the wound.
24 There was some granulation.

25 Q What does granulation mean?

1 A That is the body's attempt to heal, by putting
2 out healing tissue, called granulation tissues.
3

4 Q Yes?

5 A Now here again, I may be wrong but I can't seem
6 to find any record of a culture being taken any time during
7 this admission, although surely procedure was done.

8 Q When? Was that on December 13, 1972?

9 A Yes. Apparently it was their impression -- I
10 don't know exactly what it is based on but they must have some
11 basis, that the infection was now due to a different bacteria,
12 specifically a staphylococcus bacteria, which was treated
13 with the keflin drug.

14 Q What is keflin intended for?

15 A Well, that would probably be the specific drug
16 for the ~~staphylococcus~~ infection.

17 Q Doctor, I think there is an entry showing a
18 culture test done on November 16th. If I may show you this
19 sheet, which is a copy?

20 A Well, except that it isn't in this record. It
21 may have fallen out. I certainly accept that. As I have just
22 stated, he did have a staphylococcus infection and although there
23 is no sensitivity report, I assume that he may have gotten it
24 orally.

25 Q But the record does not reflect it?

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A No.

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Q So that if the record does not reflect it then
can we assume that it was not done?

5

A Sensitivities?

6

Q Yes.

7

A It is a fair assumption.

8

Q All right.

9

A At any event, on December 13th, an operative
procedure was performed. This is December 13th.

11

Q What did they do?

12

A Now, at that time, it states that after the
patient was prepared and draped in the usual manner, this is
in the operating room, a longitudinal incision over the old
incision exercising a portion of it. The proximal tibia
that is the upper portion of the tibia, was apparently exposed
and the lottes nail was removed. The tract, that is, the
space which it had occupied, it is called the tract, was
irrigated and this is where the cultures were taken, apparently.
Because it says they were sent at that time.

21

Then they -- the implanted the -- what we
talked about previously, but this is a first time in the entire
record. I'm referring to December 13th. They put in the
suction drainage tube.

25

Q So that is clear from the records that from

June 9, 1972 until December 13, 1972, he never had this suction drainage method applied for the administration of antibiotics for they were in; is that correct?

A Yes, that is true.

Q Now, doctor, did that failure to tubing... the irrigation and suction method conform to proper standards of practice in managing this sort of infection?

A That was part of the failure, yes.

Q And the infection had been obvious and visible and recorded as early as July 5th and July 6th, when pus was found, was that correct?

A Yes, and on many subsequent occasions.

Q All right, doctor. And from July -- from December 13, thereafter, -- by the way, what kind of -- what was the status of his infection, to what extent had it spread by that time, can you tell?

A There is no specific tellin in this -- in the notes the extent of it was no expressified in the notes. There was an omission to determine that. So I can't give you an exact answer.

Q Very well. Now, doctor, I'm -- I think we have accomplished the first phase of what I wanted to develop for the court. Can you give us just a brief narrative or summary of what his further progress was thereafter? You're aware that

1 he was -- after his discharge he was out of the hospital. May
2 I just ask you to assume the records reflect these facts, that
3 he was out of the hospital from December the 29th, 1972, until
4 May 30, 1973, when he entered the hospital at Castle Point,
5 New York, Veterans Hospital, that during that time there was
6 a continuing drainage. There was a continuing source of pain,
7 that there was no alleviation, no betterment, that he was under
8 the instructions of the hospital, doctors, was indulging in
9 self-help, using Q-tips, peroxide, changing dressings under
10 their instructions and when the condition became worse, was
11 a very, very strong odor, he then went to the hospital,
12 Veterans Hospital, at Castle Point.

13
14 Are you familiar with that general history?

15 A Yes.

16 Q All right. And are you familiar with the fact
17 that when he was at the hospital, Castle Point, in July 17th,
18 1973, that there came a time when while standing up with the
19 permission of the doctors and personnel at the hospital, he
20 felt a sudden crack in the leg which he reported to the
21 hospital personnel and assuming that the records show and that
22 he has testified under oath that at first it was deaden to
23 him, that he had a fracture and then within about two weeks
24 or so it was confirmed that he did have a fracture? I'm merely
25 asking you to assume these events to stay in continuity, doctor.

By the way, would that failure to ascertain that this was indeed a fracture when it was first reported, would that be in conformity with proper hospital practice?

A Does not seem to me to be so.

Q Why?

A It would seem to me that in view of the seriousness of the condition, the previous history, the presence of the infection, the history of the snapping and the pain, I believe he said the inability to bear weight effectively, at any rate, would all indicate without an x-ray that there was a refracture in the area and that it shouldn't have been that difficult to determine. I don't know why it wasn't determined.

Q I'm going to ask you to assume that it was reported on July 13th and the fracture was discovered by a Dr. Cheong at that time. July 13th -- it was discovered by Dr. Cheong -- that it occurred on July 17th. I'm sorry. I'd like to correct July 13th to July 17th and discovered by Dr. Cheong I believe on July 31, 1973. I want to ask you to assume that while he was at the -- I'm sorry -- that there continued and there ensued a course of casting, changing of casts, a permission to the patient to leave the hospital. He was permitted to go to Florida on a trip, that he had problems and complications there with regard to the odor, continuous

1 drainage, pain and various other sources of disability,
2 ulceration and that when he came back to New York, he -- the
3 condition worsened. I ask you to assume that he underwent
4 while at Castle Point Veterans Administration Hospital for the
5 operation involving saucerization (Phpf the tibia.
6

7 There was a fifth operation on September 18,
8 1973 at Castle Point Veterans Hospital which was the second
9 saucerism surge.

10 I'm asking you to assume further that there
11 was a sixth operation performed on May 9, 1974, which -- which
12 included incision and removal of the necrotic tissue and
13 further irrigation and I am not purporting to go into all the
14 details. I'm merely asking whether you're generally familiar
15 with these various events?

16 A Yes.

17 Q All right. And then I'm going to ask you to
18 assume that eventually he was admitted to the Veterans
19 Administration Hospital in the borough of Brooklyn, New York,
20 on October 21, 1974, where he remained to December 18, 1974,
21 that he was advised that he had a chronic osteomyelitis
22 condition, that the leg would not improve, that it likely would
23 become worse, that delay in performing an amputation might
24 endanger his upper leg, involving then the likelihood that he
25 would lose the knee joint, that he was advised to undergo an

1 amputation at a point approximately four and a half inches
2 below the knee. And that this amputation was performed, this
3 now being the seventh operation he had on October 29, 1974.
4

5 I'm going to ask you to assume that from that
6 time to the present time he has had varying episodes of having
7 the tissues at the stump area close or almost close, that
8 at times they would open, that when they would open it would
9 be accompanied by the fact that he had been indulging in
10 weight bearing, which would exasperate or worsen the condition
11 and cause the wound to open, that he would then have to remove
12 the prosthesis which he was then wearing and lie or sit but
13 avoid weight bearing in the attempt to have the wound close.
14 That this hanging on in episode every since that time to the
15 present time.

16 I'm going to ask you to assume that he has
17 complained of pains and various sensations, like itching,
18 which he has described and that he has become familiar with
19 the term as phantom sensations.

20 Sir, without going further at this time, do you
21 have an opinion that you can express to the court with reason-
22 able medical certainty as to why this amputation ultimately
23 became necessary? Based upon everything you have told us and
24 based upon your knowledge and experience as a specialist in
25 orthopedic surgery?

1
2 A Yes, I do. I believe that up to the time where
3 what you might -- what I have described as effective definitiv
4 treatment as instituted in December of 1972, when the nail
5 was removed and the drip suction method was applied, he had
6 a period or he had undergone a period of --- from July 5th or
7 6th, 1972 until December 13, which is over five months, during
8 which he'd had no effective and proper treatment for the
9 infection. The infection had become so sensitive, deep
10 seated, virulent and thoroughly engaging the bone in the sense
11 that there was severe bacterial dissemination, that in spite
12 of good treatment beginning on December 13, at least, '72,
13 and to some extent carried out thereafter, it was ineffectual.
14 The bone was no longer responsive. It failed to heal, as we
15 know, in spite of good treatment, and that the failure was
16 due, I believe, to the delay in proper treatment and the effect
17 of the delay in permitting the bone to become so thoroughly
18 involved with the various bacterial aspects which have been
19 described, so that when he sustained this fracture, the
20 fracture had -- refracture, I'm sorry, refracture, the fracture
21 had difficulty in reuniting because it was through an infected
22 area and then the combination of the failure to unite and the
23 ongoing infection, caused a decision to be rendered to him, an
24 opinion, I'm sorry, to be rendered to him that he should have
25 the limb be removed through an amputation and this was done and

1 this is the cycle of events that led up to the amputation,
2 at this point.

3
4 Q Doctor, I'm going to ask you to take the converse
5 of what I have just asked you. I'm going to ask you to assume
6 that proper care, proper therapy, proper --- and necessary
7 culture tests had been taken in a timely manner, in due time,
8 that proper antibiotic therapy would have been given and
9 administered, proper and prompt irrigation and suction, such
10 as you've described would have been instituted when the
11 infection was first noted in July, 1972, do you have an opinion
12 that you could express to this court as to whether he would then
13 have lost his leg with the nature of the fracture that you have
14 pointed out he did sustain?

15 A Yes. I believe that if he had been properly
16 treated in July, early July particularly, of '77 and perhaps
17 even within the next few days or a couple of weeks -- '72 --
18 that if this treatment had included proper bacterial studies,
19 proper antibiotics and very particularly the removal of all
20 dead bone, the institution of proper suction drainage and the
21 other methods of treatment that we have gone into and not a
22 skin grafting over dead bone, as was apparently done, that he
23 had within a reasonable degree of medical certainty an adequate
24 and excellent chance in view of his youth, his health and other
25 factors, of going on to an uneventful healing of the fracture

1 and resolutions of his infection.

2
3 Q And would his chances of complete recovery
4 have been effected by the fact that he was young and otherwise
5 healthy and vigorous?

6 A Yes.

7 Q All right. Would the fact -- would the youthfulness
8 of a person and his general good health be a strong factor
9 in relation to his chances of total recovery from such a type
10 of fracture, in the absence -- in the presence of good treatment?

11 A Certainly.

12 Q All right. Now, doctor, coming down to -- doctor,
13 assuming that he had proper care and treatment, how long, from
14 the time of this fracture, having been sustained on June 9,
15 1972, with reasonable average medical expectations would he
16 have been disabled until he would have regained his full use
17 of the leg?

18 A Including the infection, sir?

19 Q No. Assuming that there was an infection but
20 had been properly handled, how long would he have been disabled
21 until he could have gone back to work or done something active?

22 A I would believe, in this point, at the very
23 outside, six months subsequent to July 4, 1972.

24 Q That would take him roughly to the end of 1972,
25 when he would have been fully recovered?

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A Approximately the first of January, I would have anticipated a recovery to occupational return.

Q Okay.

A At that period of time.

Q All right. Now, doctor, coming down to some of his present consequences and conditions. Can you tell us what it is that in this case, unlike some amputees that one might encounter, what is it in this case that has kept this wound opening and closing, opening and closing and opening?

A Well, in this point, he has a -- an extensive bacterial involvement that has never been cleared, of the -- to an extent, the bone but particularly, the surrounding soft tissues, so that under the influence of the pressure of the prosthesis, which is unavoidable, the wound chronically breaks down at the site of the amputation scar in the sense of -- when I say break down, I mean it becomes infected and splits open, crusts, drains, clears up when he removes the prosthesis for a while, a week or so, and then after a few weeks of wearing the prosthesis, perhaps three weeks, this whole circle reoccurs again.

He obviously has not had the appropriate eradication of all the bacterial from these tissues of the remaining portion of his limb and I've advocated to him that he have certain surgical procedures.

1
2 Q Well, first, before we get to that, doctor, does
3 this condition of the soft tissues with this underlying bacteria
4 presence, is that a continuing, does that have a continuing
5 effect on the cells of these soft tissues?

6 A Yes.

7 Q What is that called medically?

8 A Well, it is called cellulitis.

9 Q Cellulitis?

10 A An inflammation of the cells.

11 Q Doctor, as it now stands, is it permanent?

12 A As it is today, it appears to be permanent.

13 Q Is there any medication, antibiotic therapy
14 that can -- after all these years, since 1972, cope with that
15 medically speaking?

16 A Not -- not alone. He'd have to have more than
17 just medication.

18 Q Now, doctor, you have mentioned that -- you
19 mentioned that you have discussed with him the possibility of
20 some surgery; is that correct?

21 A Yes.

22 Q What kind of surgery are you talking about?

23 A He would have to have a further -- a revision
24 of the amputation, shortening the remaining portion of the limb,
25 removal of all tissues in relationship to the area of recurring

1 infection, including the underlying bone and this is -- then
2 he'd have to of course after that have a refitting of his
3 prosthesis.
4

5 Q Is that something you can unqualifiedly recommended
6 to him without any reservations or hazards or risks?

7 A No. I think that infection has been present
8 for so long that the possibility of reinfection above the site
9 of the operation that I have proposed is certainly a 50 percent
10 possibility.

11 Q 50 percent possibility of it being successful
12 and not successful?

13 A That's right.

14 Q What if it is not successful?

15 A Well, at this point, with a four and a half
16 inch stump that he has, you'd have to take off approximately
17 an inch and a half, to get to healthy tissue or what seems to
18 be healthy tissues.

19 Now, if this broke down, if this became infected
20 then you'd be faced with having too short a stump for effective
21 fitting with a prosthesis and you'd have to consider reamputating
22 the next time above the knee, where you have a whole new ball
23 game. It is bad enough to be a below kneew amputee but an
24 amputee requiring an above knee with an artificial knee socket
25 and everything else is an even more functionally disabling

1
2 problem.

3 Q There is a desire I believe to keep that knee
4 joint, which he still has?

5 A Yes.

6 Q But then as -- if he elects not to take this
7 gamble, doctor,--

8 A Well, then he is caught in a terrible dilemma
9 because as he is today, with the constant breakdown, he can't
10 have a normal life either. In other words, he's faced with
11 a gamble of what happens. He can't function very well today.
12 He's constantly breaking down. If he gambles and it does
13 work, okay. If it doesn't work he loses his knee.

14 Now, this is the terrible dilemma he's in. The
15 third possibility is that if nothing is done, the infection
16 of itself may -- may break out in a sense of spreading so that
17 you would have no choice but to amputate above the knee anyway,
18 if the infection extended. I think I could demonstrate, if
19 he could disrobe. I could demonstrate the problem.

20 MR. KELNER: Your Honor, may we exhibit that
21 at this time? It is in the context of his testimony.

22 THE COURT: Surely.

23 MR. KELNER: Would you step up here, Bob?

24 THE WITNESS: Sit down.

25 MR. KELNER: Have him sit in the chair there.

1
2 A Have him sit back. He has a prosthesis that
3 is attached to a hip suspender, straps coming down his thigh
4 which he's currently unloosening for you. Now, there are
5 attaching straps here. This is the problem area here.
6 Currently twice I've seen it, it has been considerably worse
7 than it is today, but through this crusted area here, he gets
8 a backup. Then he gets a cellulitis. This whole area becomes
9 red, inflamed, very tender and he cannot tolerate the limb
10 when that happens. When I saw him last, this was the case.
11 I believe that was five days ago. The revision, in other words,
12 to remove this area of chronic recurring infection, would require
13 reamputation at about the level I'm demonstrating here. Now,
14 to do that, would leave him with a bear minimum stump, which
15 can function in a prosthesis. If that new level were to break-
16 down, then there would be no choice. There wouldn't be enough
17 here to fit. You'd have to amputate above the knee level.

18 Q Now doctor, you mentioned cellulitis, doctor.
19 Where is there an area of cellulitis, in your opinion? Based
20 upon everything that you have told us?

21 A Well, the area I'm demonstrating now, the redness,
22 the crust, the indentation, in this general region. This is
23 rather quiescent, quite, at the moment compared to what it was
24 a few days ago. I don't know if he followed my instructions.
25 I didn't speak to him but I told him on that day to leave off

1 the prosthesis and elevate his leg and do certain other things
2 and see if we can -- couldn't get this thing in shape at least
3 to make a court appearance with the prosthesis.
4

5 He tells me that he gets these severe flare-ups,
6 he told me, I'm sorry, Friday, that he gets these severe flare-
7 ups about one week in every month and that he's nonfunctional.
8

9 Q Doctor, I'm going to ask you to assume that he's
10 told us based upon the cycle that he's familiar with over the
11 years, that this is now in the beginning stages of an opening
12 up process.

13 A Yes.

14 Q Now, when it opens up, where does it open up in
15 this wound that we are looking at?

16 A Right in the point area I am describing here.

17 Q Now, is there any way medically, in relation
18 to the possible gamble of further amputating this additional
19 part of the leg that you mentioned, is there any way of analyzing
20 how far this cellulitis condition would extend in relation to
21 the evaluation of whether this is a 50/50 gamble or possibly
22 a little bit better than 50/50?

23 A No.

24 Q What?

25 A There is no way of telling.

Q No way of telling, but these are minute cells

1 that are the subject of the cellulitis condition you're talking
2 about?
3

4 A Yes.

5 Q And when he is using this prosthetic device, this
6 artificial leg and placing pressure, that pressure is exerted
7 where, doctor?

8 A Well, actually all over. You'd have to see the
9 lining of the prosthesis, but the principal point is at -- you
10 see, this is a soft buffer and this is what has to be maintained,
11 as a cushion, but you see what happens as soon as the pressure
12 comes here, it keeps playing against this infected area.

13 Q Is that causing him pain when you press like
14 that?

15 A It is for him to say.

16 PLAINTIFF: Yes.

17 THE COURT: He's the only one who can say that.

18 Q That pressure that you just indicated would be
19 the cause in relation to the cellulitis, do I understand you
20 correctly?

21 A Yes.

22 Q Of causing these episodes or cycles of openings
23 and closings?

24 A Yes. I think that -- is this clean?

25 PLAINTIFF: Yes.

1
2 A There is no drainage today, obviously but some
3 old staining there?

4 PLAINTIFF: Yes.

5 A That old staining apparently is drainage.

6 Q When it opens, doctor, is there drainage that
7 you have actually seen yourself?

8 A Yes, I've seen drainage there.

9 Q Okay. What is the course that he can take or
10 must take when it is draining, in relation to walking, standing
11 trying to work or do anything like that?

12 A He cannot wear the artificial limb.

13 (Continued on next page)

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Q Then is he totally disabled for practically everything?

A Practically, yes.

Q Doctor, just a few more questions, if I may, or maybe more than a few more:

Doctor, he has described these phantom sensations even in the missing foot, pain in the missing foot, squeezing in the missing foot, can you tell us medically what is the cause, how is it possible for him to have these sensations from this missing part of his leg?

A This is from his so-called phantom limb and it is almost invariably seen in every amputee when the nerves are cut here (Indicating), the brain still gets an impulse from the cut edges and the impulse is somewhat distorted, but the mind orientation is that the impulse is coming from the toes and ankle and so forth to where the nerve was originally going to.

Q Is this imaginary or does he really feel them?

A Oh, no, they are all real.

Q They are all real?

A Oh, yes, because of the cutting of the nerve, but it is still running to the brain.

Q It is still running to the brain?

A That is right, the upper portion is still going up.

Kovan - direct

Q Doctor, in your opinion, is that permanent?

A Oh, yes.

Q He will have it all his life?

A Yes.

Q Are you aware or have you been told or assuming he has testified to this in this court that practically, not every night but on the average of five nights a week he has to get up, he has to bathe the leg in warm water just to try to get some relief: are you familiar with that?

A I am not familiar with that, that is --

Q Well, assuming he had it?

A Assuming he had it, it would be compatible with his condition.

Q Is there something that you have known, amputees have to do in order to try to help themselves?

A Yes, occasionally.

Q Now, Doctor, the life of an amputee, and from your own knowledge, with regard to social activities and employability, can you tell us something based on your actual experience with amputees?

MR. RUDOLFSKY: Your Honor, I'm going to have to object to this.

Obviously the doctor is not an amputee, he hasn't testified that he has any background, and I have

Koven - direct

to assume that the only thing he would know is what other people have told him.

THE COURT: I don't assume that is the question, I think he is asking as a medical expert does he have any reasonable degree of knowledge as to what an amputee's condition is, not whether he knows.

MR. RUDOPSKY: The only way the doctor, Doctor Koven, could have that knowledge is by what other people, I assume his patients have told him, which is clearly hearsay.

THE COURT: From what he draws a diagnosis or makes a prognosis, either way I will allow that.

Q Would you answer in the context of defining what the question is or limiting it to what the question is?

A Assuming that -- well, let's assume that he didn't have the cellulitis for a moment and let us describe him with a normal amputation, then I will take it separately with the cellulitis, if that would clarify it.

Q Please do so.

A An amputee is a work hazard, he has a much lower level of employability, many employers are very reluctant, some are much more public-spirited, but for the most part patients inform me that they have difficulty in convincing an employer --

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Koven - direct

MR. RUDOFISKY: Your Honor, this is exactly what I am talking about.

THE COURT: Yes, I would say I would have to agree. I would agree that this part would be hearsay.

Q Let me approach it this way --

THE COURT: The plaintiff has testified and he said what has occurred or didn't occur.

THE WITNESS: Can I answer it in terms of what he has told me?

THE COURT: No, that will not be good.

Q Let me approach it this way, Doctor:

Doctor, assuming that he had no cellulitis, with these frequent opening and closing episodes, even so could he perform any work such as an electrician, standing on his feet, bending, twisting, turning, going up step-ladders, climbing into small spaces and getting into various body positions that would require exertion and bending of various ways?

A No, he would have to have a sedentary job, predominantly in a sitting position with perhaps some special combination for travelling to and from the job.

Q Now, Doctor, from the standpoint of an amputee, generally, assuming the maximum good recovery from the amputation, without cellulitis and drainage, have you medically had to handle and cope with such patients with regard to their

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2 Hoven - direct

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3 adjustability to different types of phases of their life,
4 whether it is social or employment or anything of that nature?

5 A Yes, I have.

6 Q In what respect have you personally had to handle
7 your patients who have had amputations with regard to their
8 adjustment in life?

9 A Well, advisory, I would say that anybody who
10 deals with amputees becomes a sort of psychiatrist, social
11 worker, confidant and everything else, and in that respect I
12 am familiar with their problems.

13 Q Doctor, can you then, limiting it to your
14 experience in the handling of patients and your professional
15 guidance that you administer on the basis of your experience
16 and training, can you indicate to the Court some of these
17 areas of problems and what has to be done with regard to them?

18 A Well, on a purely physical level, the obvious
19 recreational handicaps which are particularly severe in the
20 younger ones, who are more motivated to participate in active
21 sports and --

22 MR. RUDOFISKY: Your Honor, I don't mean to beat
23 a dead horse but we are in the same area, we heard
24 Mr. Lennon's story and he is the person involved in this
25 case.

THE COURT: Yes, I think that is obvious.

Koven - direct

MR. KELNER: May I just check my notes to see if I have omitted anything?

I think I'm almost through, Judge.

(At this point Mr. Kelner conferred with his associate.)

Q Doctor, you mentioned this possibility of further surgery and the gamble and the hazards that you have described, and I don't want to repeat the hazards of this, the surgery which you discussed with him, but sitting there as you are now today, can you recommend to him that he should take this gamble, or do you have any hesitancy about it?

A Well, I --

MR. RUDOFISKY: Before he answers the question, your Honor, I --

THE COURT: I assume with a reasonable degree of medical certainty, it just can't be speculative.

Q With a reasonable degree of medical certainty.

MR. RUDOFISKY: Your Honor, I think it is relevant we have to know what the future may hold, but what this doctor at this time can recommend is not, I think, is not going to be very helpful in this case.

MR. KELNER: He may not recommend anything, I want to hear what his answer will be.

THE COURT: He is entitled to an answer, as an

7
2 Kovan - direct

3 expert he is entitled to an answer.

4 A As I have stated before, there is a 50-50 chance
5 here, and in these situations it is my policy not to be
6 forceful, if I can use that word; the patient has to be a
7 participant, knowing all the possible outcomes. The ultimate
8 decision, since here we are not dealing with cancer, let us say,
9 has to be a joint one and not one that I would enforce upon him,
10 if I understand your question.

11 Q Doctor, so that you can understand me, if this
12 young man asked you flatly, unqualifiedly, do you recommend it,
13 or did you recommend it or are you going to recommend it as a
14 possibility without being in the position of recommending it:
15 what would be your answer?

16 A My answer would be the latter, that I would not
17 specifically recommend it, I would --

18 Q Why?

19 A I think that the hazards are perhaps too strong.
20 I personally would rather have a limb below the
21 knee amputation and take a gamble that I would have some measure
22 of control of my life still. But I must say that what we are
23 dealing with, I think for a full answer here, is a dynamic
24 situation: that is, if the infection gets worse, and it may
25 very well be, then there may come a point where I might be much
more forcible in telling him. So that it is an ongoing situation

1
2
3 with an answer at almost each stage rather than at one po
4 in time. I think it is a hazard both ways, certainly there
5 are hazards both ways.

6 Q Now, Doctor, in further examining and treating
7 this young man now as your patient, which he says he is; is
8 that correct?

9 A He has informed me that he wishes to remain
10 under my care from now on.

11 Q And not to go back to the government or
12 Veterans Administration Hospital; is that correct?

13 MR. RUDOFISKY: Your Honor, I must object --
14 There is no jury here, but I think Dr. Kaplow is this
15 young man's doctor and we ought to keep the record
16 straight.

17 Q Doctor, assuming he elects not to go to any
18 hospital under the Veterans Administration of the navy or
19 whatever but wants his private physician, assuing yourself,
20 then, Doctor, what is proper with regard to your compensation
21 for further surgery, for observation, medical studies and
22 X-rays; what would be your compensation then, Doctor, would it
23 be by arrangement with him or would it be by the government.

24 A Well, not that I am aware of to my knowledge,
25 he would be a patient, a private patient of mine and subject to
the usual, customary fees in my practice.

Q And can you at this time give any specific prognosis as to what in the future he may undergo in the way of surgery, medical care and project any expenses?

A Yes, I can.

Q What can you do?

A I think that in the light of the history and in the light of almost a five year interval, and in the light of the recurring episodes, that while on this very day he may not accept or may decide, knowing the risk, not to accept a revision, I believe that with what I find and his history that eventually it will not be an attractive situation and that it will be mandatory, so I think he will have one revision, if I can project, one revision, an operation. I cannot predict whether he will have to have a second above the knee amputation.

So I would expect that -- and your question has to do with finances -- that we may be talking in terms of medical fees and on a yearly basis, with X-rays and so forth, of perhaps several hundred dollars, and if an operation is involved -- there might be an additional thousand dollars -- and if an operation is involved there will be an additional perhaps two or more thousand dollars of surgical fees.

Q And, Doctor, assuming this sinusitis condition pervades the area, is this a chronic condition which you can tell us with reasonable medical certainty which may require

1
2 further medical care for the years of his life?

3 A Yes.

4 Q And what is your opinion of that?

5 A He would have an on-going substantial expense
6 medically for his care, but I don't know what the future fees
7 will be.

8 Q Right.

9 MR. KELNER: I have no further questions, your
10 Honor.

11 THE COURT: Will you just step forward?

12 The Doctor has asked to be relieved after this
13 morning, but we can bring him back Friday morning at
14 11, I think.

15 Bring him back at 11 o'clock on Friday.

16 MR. KELNER: Your Honor, may we go off the
17 record?

18 THE COURT: Yes.

19 (Discussion off the record.)

20 THE COURT: We will make it Friday at 11 o'clock.

21 MR. KELNER: Friday at 11 o'clock, yes, your
22 Honor.

23 (A recess was then taken until Friday morning,
24 March 11, 1977, at 11 A.M.)
25

* * *

INDEX

Name of Witness	Direct	Cross	Redirect	Recross
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ROBERT A. LENNON				206
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LEO KOVEN	207			
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EXHIBITS

Plaintiff's Exhibit No.	Description	For ID	In Ev.
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1	hospital record		223
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2	hospital record		224
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3	hospital record		224
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4	hospital record		224
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5	hospital record		225
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REMOVAL

ERASABLE

COTTON CLOTH

1 UNITED STATES DISTRICT COURT 311
2
3 EASTERN DISTRICT OF NEW YORK

4 -----X
5 ROBERT A. LENNON, :
6 Plaintiff, : 76-C-396
7 -against- :
8 UNITED STATES OF AMERICA, :
9 Defendant. :
10 -----X

11
12 United States Courthouse
13 Brooklyn, New York

14 March 11, 1977
15 10:00 o'clock A.M.

16 B e f o r e :

17 HONORABLE MARK A. COSTANTINO, U.S.D.J.
18
19
20
21
22

23 EMANUEL KARR
24 OFFICIAL COURT REPORTER
25

41 312

Appearances:

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JAMES H. DEUTSCH, ESQ.
Attorneys for Plaintiff

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United States Attorney
for the Eastern District of New York

BY: EDWARD S. RUDOPSKY, ESQ.
Assistant U.S. Attorney

1
2 THE CLERK: Civil cause on trial, Lennon v.
3 United States.

4 MR. KELNER: Your Honor, before we proceed, may
5 I just resume direct examination for just a little
6 while on Dr. Koven, merely to demonstrate some and to
7 get into evidence just a few X-rays?

8 THE COURT: Yes.

9 D R . L E O K O V E N , called as a witness on
10 behalf of the Plaintiff, having been previously sworn,
11 continued to testify as follows:

12 DIRECT EXAMINATION

13 BY MR. KELNER (Cont.):

14 Q Dr. Koven, at my request have you looked --

15 MR. RUDOFISKY: In the interest of time, I would
16 not object to putting all the X-rays in evidence.

17 MR. KELNER: I don't want to clutter the record,
18 your Honor. As I go along I think you will see I am
19 trying to simplify matters.

20 BY MR. KELNER:

21 Q At my request, Doctor, did you select and look
22 at these X-rays just a little while ago for purposes of
23 separating some of the June 1972 X-rays, at the time of the
24 accident, and then jumping ahead and finding these X-rays
25 in July 1972 and then coming up to 1974, or at or about the

1
2 time that the leg was amputated to show what the progression
3 was or if there were any changes in the bone structure?

4 A Yes, I did.

5 Q Now, first, Doctor, will you step down --

6 MR. KELNER: With your Honor's permission --

7 Q (Continuing) and select any of the early X-rays
8 at or before the time of the accident and just one or two to
9 show what the bone structure was at that time.

10 (The witness then took a position beside the
11 X-ray box.)

12 A Just by way of explanation, many of the early
13 X-rays are clouded by having been taken in a cast or heavy
14 bandages.

15 I am not trying to be selective. I am simply
16 trying to pick the ones that are the clearest and which had
17 been taken immediately after the operation that was performed
18 to fix the bone itself.

19 I have here the one dated June 9, 1972 --

20 THE WITNESS: If you want to mark it.

21 MR. KELNER: Yes, may we have it marked?

22 MR. RUDOFISKY: No objection.

23 THE COURT: Mark it.

24 THE CLERK: X-ray film marked Plaintiff's

25 Exhibit 6.

1
2 BY MR. KELNER:

3 Q Just to save time, Doctor, may we have you pick
4 out something a little bit later in 1972 that would be
5 representative or typical of what the bone structure looked
6 like at that time?

7 A This is 7/13/72.

8 Q That is 7/13/72 --

9 MR. RUDOFISKY: Your Honor, I don't have any
10 objection to putting this X-ray.

11 These are all authentic X-rays. There is no
12 question about it. The Government provided them, but
13 I would object to putting them as representative of
14 anything. They are what they are.

15 THE COURT: Mark them all as X-rays in evidence,
16 then he can place them in the shadow box and tell us
17 which one he is looking at.

18 Give them all one exhibit number.

19 MR. KELNER: Well, there probably are fifty
20 X-rays. I thought I would spare the record from
21 being cluttered, but I have no objection to doing that.

22 THE COURT: All right, then you can pick out
23 four or five.

24 MR. RUDOFISKY: He apparently picked out the ones
25 he wanted.

BY MR. KELNER:

Q The second one is dated July 13th?

A Yes, sir, July 13, 1972.

MR. RUDOPSKI: July 13, 1972?

MR. KELNER: Yes.

THE CLERK: X-ray marked in evidence as
Plaintiff's Exhibit 7.

MR. KELNER: This one is 9/18/72.

MR. RUDOPSKY: 9/18/72.

If you will come over here you will see it is
9/18/72.

MR. KELNER: It is 9/18/72, and this is
Plaintiff's Exhibit 8.

THE CLERK: Exhibit marked in evidence as
Plaintiff's Exhibit 8.

THE WITNESS: This is 9/23/74.

MR. KELNER: That will be No. 9.

THE CLERK: X-ray marked in evidence as
Plaintiff's Exhibit 9.

MR. KELNER: I think that is sufficient for our
present purposes, your Honor.

THE COURT: All right.

BY MR. KELNER:

Q Now, Doctor, will you now take the first of the

2 X-rays, which is Plaintiff's Exhibit 6, the earliest one by
3 date, I think.

A 317-

4 A This is the X-ray --

5 Q Will you stand a little aside so his Honor can
6 see it?

7 A Yes.

8 This is the X-ray of June 9, 1972, following an
9 operation, and I am indicating (indicating) the site of the
10 fracture which was here (indicating), and it is now fixed by
11 this lottes nail, as I indicated the other day.

12 Q Now, Doctor, before you go ahead, could you just
13 tell us generally about the structure or composition or the
14 health of the bone, ignoring the break part of it, just the
15 structure of the bone itself, could you tell us how that
16 appears to you?

17 A This (indicating) is normal bony structure.
18 These black spots out here in the muscle planes, the white
19 being the bone, the gray being the muscle planes, that is
20 there is some air that has gotten in, but otherwise there is
21 nothing abnormal here at all.

22 Q Except for the fracture?

23 A The fracture, yes.

24 Q Just so that we can be oriented, what is this
25

1
2 area here? (indicating)

3 A That is the fracture of the small bone of the
4 leg, the fibula.

5 Q And the tibia, the main bone, the main weight-
6 bearing bone of the leg is broken?

7 A It is broken here and has been fixed.
8 (indicating)

9 Q And was that broken all the way through here
10 (indicating), even though the metal, the metal here is
11 obscuring it?

12 A Yes.

13 Q Would you show us the next X-ray, Doctor?
14 Is there some more?

15 A This is Plaintiff's Exhibit 7.

16 (The exhibit was then placed in the shadow box.)

17 A It was selected because it is a comparable view,
18 that is, it is the same relative view, and in this view here,
19 if you will notice, there is an area here which is about two
20 inches --

21 Q The date of that is what?

22 A 7/13.

23 Q 7/13?

24 A 1972.

25 There is an area, an oval area of gray in the

1 shadow of the tibial bone which I believe is the earliest
2 evidence of an inflammatory or infectious process going on
3 within the marrow cavity here of the bone (indicating).
4

5 Q Now, Doctor, yesterday -- I am sorry,
6 Wednesday, you mentioned that on June 29th, which would be
7 about two weeks before this Xray was taken, and then on
8 July 5th and 6th, there was visible evidence of infection
9 setting in, namely pus and the other indications of it, and
10 that would be about a week or so before this X-ray was taken;
11 is that correct?

12 A Yes, but if I may explain, I didn't find any
13 X-rays of those dates.

14 Q I see.

15 A This is the earliest X-ray I found following the
16 clinical evidence of an infection.

17
18 (continued next page)
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1
2 Q By the way, Doctor, you have never been trained
3 especially as a radiologist, as a specialist in X-rays, X-ray
4 work; is that correct?

5 A That is correct.

6 Q However, in connection with your studies and
7 your surgery and your handling of many, many fracture cases,
8 have you developed by teaching, by learning in medical
9 schools and in experience the art of interpretation of X-rays
10 associated with injuries which you had operated upon or which
11 you handled and treated?

12 A Yes, I did.

13 Q All right.

14 By the way, approximately how many X-rays would
15 you say in your career have you ever taken or interpreted and
16 studied in connection with cases you have worked on?

17 A Many thousands.

18 Q All right.

19 Now, is there anything further you want to show
20 the Court with regard to these X-rays?

21 A Just this area which within a few days the pus
22 was first discovered.

23 Q Very well.

24 A The next (placing new X-ray in shadow box) is
25 Plaintiff's Exhibit --

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Q 8.

A 8, and it is dated September 18, 1972.

And here, what started out in the previous X-ray as a little or small oval area of bony infection has now enlarged and it is more blackish, more involvement.

It goes about the nail (indicating), comes down to the fracture site, and then these are irregular (indicating) areas where it is draining out through the bone.

It is also visible here (indicating), but it is better visibly on the comparable view, again these two views being technically comparable. (indicating)

Q What is the medical terminology for these areas of darkness that you have pointed out?

A That is bone abscess or a part of the osteomyelitis, the formation of bone abscess.

Q Doctor, when you testified two days ago you had told the Court that based upon the omissions and failures of prompt treatment, and I don't want to be repetitious, that there was this infection that ensued because of the reason that you specified.

A Yes.

Q And the failure to conform to proper medical standards of care.

Now, I ask you to look at this condition that

1 you have now pointed out as osteomyelitis.

2
3 Do you have an opinion that you can express
4 with a reasonable certainty to this Court as to what was the
5 cause of the osteomyelitis of the bone?

6 A Well, the initial cause of the osteomyelitis
7 was the invasion of the bone with a bacterial organism and
8 then a pus leveloping process ensued about and above the
9 area of fracture, about, about the nail, and within the
10 marrow cavity of the bone.

11 Q And assuming all of the things you told us
12 about Wednesday, the failure to perform prompt culture tests
13 and prompt medication, prompt --

14 MR. RUDOFISKY: Your Honor --

15 Q (Continuing) -- therapy --

16 MR. RUDOFISKY: Can we get to the X-rays?

17 Your Honor has heard all of this. It is not
18 going to change.

19 MR. KELNER: This is merely because I didn't
20 have the X-rays available the other day in this order,
21 your Honor, that I asked you --

22 THE COURT: Go ahead.

23 BY MR. KELNER:

24 Q Doctor, if I were to repeat all the same
25 questions, would your answer still be the same, that this

1
2 condition was caused by the various omissions and failures
3 of proper care that you told us about on Wednesday?

4 A The ongoing aspect of the case, yes.

5 Q Will you look at the next X-ray, Plaintiff's 9.

6 A It is dated September 23, 1974.

7 (The X-ray was placed in the shadow box.)

8 Q That would be two years and three months after
9 the original injury?

10 A Yes.

11 The nail has been removed (indicating), the
12 fracture appears still to be present, I cannot be absolutely
13 certain because there are other views, but the osteomyelitis
14 is still present and there is this grayish, eroded, moth-eaten
15 area which I am pointing to here (indicating).

16 Q And that was just about one month before the
17 amputation, the date of the amputation, the date of amputation
18 being October 29, 1974, which was the day of amputation, and
19 based upon that was this the approximate condition of the bone
20 when it was amputated, in your opinion, and this is about one
21 month later?

22 A As far as I know.

23 MR. KELNER: All right. No further questions.

24 MR. RUDOFISKY: Doctor, will you leave the X-
25 rays there? Will you leave those two up there, please?

CROSS-EXAMINATION

BY MR. RUDOFISKY:

Q Doctor, would you please examine and identify, if you would, this X-ray?

A This X-ray is dated 5/18 —

THE WITNESS: Is it '74?

MR. RUDOFISKY: I think it is '73, but perhaps counsel would like to look at it or the Court and we can agree.

MR. KELNER: Well, I don't think anyone can say that is a 3 or a 4, unless we have a magnifying glass.

THE COURT: I have a magnifying glass.

MR. KELNER: I think we will agree that it is 1973 but we can confirm it after, later, after we get a magnifying glass.

BY MR. RUDOFISKY:

Q Now, Doctor, am I correct, do we follow each other, this then would be approximately five or so months after, in fact it would be six months. You have testified that effective treatment in your opinion was begun on December 13, 1972?

A Yes.

Q Is that correct?

A Yes, sir.

1
2 Q That would be approximately six months and some
3 days after effective treatment was begun in your opinion, and
4 it would be approximately a year and four or five months
5 before the amputation which was performed at the end of
6 October 1974; is that correct?

7 A Yes.

8 MR. RUDOFISKY: Your Honor, I would like to ask
9 to have this marked as Government's Exhibit A.

10 THE COURT: Government's Exhibit A.

11 THE CLERK: An X-ray marked as Government's
12 Exhibit A in evidence.

13 THE COURT: Would you want to verify it with
14 the glass, just in case?

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16 (continued next page)
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2 MR. RUDOFISKY: I think it is clear, but we can
3 satisfy our curiosity.

4 I think it is clear that it is a 3.

5 MR. KELNER: It is still very fuzzy, Judge, but
6 I don't think there is any practical purpose for
7 disagreeing.

8 I can't see it, I can't see it.

9 MR. RUDOFISKY: All right.

10 BY MR. RUDOFISKY:

11 Q Now, is it your testimony on the basis of the
12 exhibits, the X-ray exhibits that Plaintiff introduced into
13 evidence, just a minute or so ago, or two minutes ago, that
14 this infectious process was continuous, a more or less
15 continuous process, and that the X-rays that you identified
16 for the Court showed a continuing deterioration of the bone
17 and bony structure: is that the testimony?

18 A The X-rays that I showed to the Court showed
19 progression of the process.

20 Q And so am I correct that Plaintiff's Exhibit 9,
21 which is dated 9/23/74, shows the process at its worst with
22 respect to the X-rays that you have identified for us; is
23 that correct?

24 A With respect to those X-rays, yes.

25 Q All right.

1
2 And Plaintiff's 8, which is dated 9/18/72,
3 is approximately two years before Plaintiff's 9, and you
4 say that this continuum basically got worse upon your
5 understanding of the facts of the case; is that correct?

6 A This is 9. It is somewhat worse than -- or
7 perhaps a better way to express it, it is at a different
8 stage, a more advanced stage than Exhibit 8, which is 9/18/72.

9 Q All right.

10 Now, would you describe the medically
11 significant portions, significant with relevancy to this case,
12 of course, of Government's Exhibit A?

13 A Government's Exhibit A is 5/18/73 and that
14 demonstrates that the fibula, the smaller bone is held, the
15 previously noted nails have been removed, the bone is
16 slightly deformed in the sense of its being angulated to the
17 old fracture site, there is fairly dense callous, which is
18 new bone formation, the callous has enveloped the bone for the
19 most part except for the area in front where I am pointing
20 (indicating), and the bone appears to be held as far as the
21 fracture is concerned, although I couldn't be absolutely
22 certain because the X-rays are a little undershot, although
23 it probably is, and except for a small area that I am
24 pointing to here (indicating), which I can mark with a
25 marker, there is at this time, there is much less evidence of

if I may use the word, active infection than in the previous X-ray.

(At this point, the witness drew an arrow at the point indicated.)

(continued next page)

Q Is there any evidence of previous infection?

A Yes, I thought I said that. The density of the bone above and below the old fracture site is the scarring of bone which is associated partly with the healing process of the fracture and partly with the healing process of the osteomyelitis.

Q Is there any evidence on that x-ray, May of 1973 of --

MR. RUDOFISKY: Your Honor, for the record, I will note I am now going to quote from page 262 of the transcript beginning at line 9.

Q Now, is there any evidence of deep seated virulent infection thoroughly engaging the bone. Do you see any evidence of that on the intervening x-ray after all of this alleged malpractice had taken place?

MR. KELNER: Are you asking only on this x-ray? Are there others in evidence?

MR. RUDOFISKY: I am asking him with respect to this, if there is evidence of a deep seated virulent infection thoroughly engaging the bone?

MR. KELNER: Would you fix the date with this x-ray once more with regard to that question?

MR. RUDOFISKY: May 18, 1973.

THE WITNESS: May I ask you what date are you

1

2

Quoting?

3

Q What am I quoting from.

4

A I mean as of what date?

5

Q You testified that as of December 18, 1972

6

which is the date in your opinion that effective treatment

7

began that as of that date the infection had become so sensitive

8

deep seated, virulent and it was thoroughly engaging the

9

bone, and you said, I will continue reading that in spite of

10

good treatment beginning on December 13 and to some extent

11

carried out thereafter it was ineffectual, the bone was no

12

longer responsive, it failed to heal.

13

Do you see evidence of that on that x-ray?

14

A Yes. Since you are reading the December 72

15

statement and in spite of the fact that every word of which I

16

would repeat as of the date that you are quoting, I still

17

see some evidence of some deep seated infection specifically

18

to act as a focus for "myself" deep seated, from which area

19

there was a later flare up resulting in the loss of his limb.

20

Q Now, you are telling us that you see as of

21

May 73 some evidence of deep seated infection?

22

A Yes, sir.

23

Q Do you see any virulent infection there?

24

A Virulence is a clinical expression.

25

Q Do you see any evidence of thoroughly engaging

the bone?

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A On that day, no.

Q Now, could an orthopedic surgeon or any other physician, give the state of that bone, on May 18, 1973, and assuming that proper medical care was given to Mr. Lennon thereafter --

MR. KELNER: After when?

Q After May 1973, did this condition necessarily have to lead to Mr. Lennon's condition today?

MR. KELNER: That is objected to as very vague.

THE COURT: It's kind of a speculative kind of question. We are more concerned with the situation as it developed.

Q Let me say --

MR. RUDOFISKY: We are not interested in the hindsight analysis.

We heard testimony here that we had alleged mal-practice.

THE COURT: But we are interested in what is shown and what is occurring and what took place without hindsight.

MR. RUDOFISKY: We have heard that with the exception of the refraction in July of 1973 that there was proper medical treatment.

MR. KELNER: But instituted too late.

THE COURT: Well, that's for me.

MR. KELNER: I know. That's the contention, your Honor. The question is just ignoring the preliminaries.

THE COURT: All right. Rephrase your question.

Q In your opinion does this x-ray show Mr. Lennon's condition on May 18, 1973, with respect to this, the tibial fracture and the infection and healing process?

A This shows the x-ray condition of his condition on that date.

MR. KELNER: May I clarify it as to the bone, because nobody is purporting to know the soft tissue structure from the x-ray. Is that the extent of your question?

MR. RUDOFISKY: My question is to find out whether Dr. Koven's -- whether Dr. Koven's testimony on Wednesday still stands in light of this x-ray and whether it makes any sense in light of this x-ray.

He didn't testify about the soft tissue damage on parge 262 but infection of the bone and it failed to heal in spite of good treatment. That's what he said. I am not misrepresenting what he said.

MR. KELNER: May we have a direct question?

1 I dont quarrel with any of that, your Honor.

2 May we have a direct question?

3 THE COURT: Yes.

4 Q My question to you, Dr. Koven, is as of May
5 18, 1973, was this bone seriously infected?

6 A Seriously is a hard word to pin down. It was
7 definitely infected.

8 Q Was it infected to a point where it was
9 beyond the aid of a good medical treatment?

10 A That, only the future could tell from a
11 medical standpoint. The potential is there. Was it infected
12 on this date -- what was the rest of your question?

13 Q May 18, 1973, --

14 A May 18, 1973, there was a significant improve-
15 ment. There was healing in the bone. There was some residual
16 evidence of infection from which site anything might happen in
17 the future.

18 Q So, do I understand your answer to be that you
19 couldn't tell us with any reasonable degree of medical
20 certainty what would have happened from that date on; is that
21 correct?

22 A Yes.

23 Q Does that include the possibility that a
24 patient in this condition could have been successfully treated?
25

1
2 A He might have been, referring to this condition
3 referring to May of 1973.

4 Q That's right?

5 A Yes.

6 Q With proper medical care, presumably?

7 A Perhaps.

8 MR. RUDOFISKY: Your Honor, I have no further
9 questions with respect to the x-ray at this time.

10 I would like to ask Dr. Koven to resume the stand.

11 THE COURT: All right. Turn the lights off.

12 Resume the stand, please doctor.

13 Q Dr. Koven, would you tell the Court something
14 about the nature of your practice? Do you see many amputees?

15 A Many, is a vague word. I see some amputees
16 which is vague.

17 Q Could you tell us what percentage of your
18 practice is made up of amputees?

19 A Fortunately, quite few.

20 Q Less than five percent?

21 A What is that?

22 Q Less than five percent?

23 A Yes.

24 Q Less than two percent?

25 A I would think so, yes.

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Q I take it though, that you have, I believe you testified to this on Wednesday that you have treated many tibial fractures in the course of your career?

A Yes.

Q Have you seen many patients with osteomyelitis?

A Yes.

Q Are these patients who were referred to you when they had osteomyelitis or developed osteomyelitis when you were treating them, or both?

A Both.

Q Would you tell us how many of the patients who developed osteomyelitis -- withdrawn.

Q Could you tell us how many of your patients developed osteomyelitis while you were treating them?

MR. KELNER: I think that's irrelevant and immaterial, your Honor.

THE COURT: I don't think that's relevant at all. I will sustain it. That's not relevant.

MR. RUDOFISKY: May I be heard on it, your Honor. I think I am -- I plan to ask the doctor about the nature of osteomyelitis.

THE COURT: You can ask him that but you couldn't ask him -- you are assuming first of all that the patient developed osteomyelitis --

MR. RUDOFISKY: He testified they did develop osteomyelitis.

THE COURT: Of course, but the number is immaterial.

Q Is it your opinion that those patients of yours who developed osteomyelitis had developed it even though they were treated in conformity with the proper standards of medical care?

A It may occur, yes.

Q And isn't that really a general statement about the nature of osteomyelitis, it very well may occur?

A Yes.

Q Even if the best of care is given?

A Yes.

Q Perfect care, optimum care; is that right?

A True.

Q Specifically, with respect to tibial fractures could you tell us a little bit about how osteomyelitis is contracted?

A Actually bringing it on to the year of 1972 which is the year in question, the patients who develop fractures of the tibia with no break in the skin -- that's a so-called simple fracture, who were not treated by an open procedure of -- have a zero percentage of infection. Those

2 who have compound fractures in New York City as opposed to
3 other areas, and who are operated, such as this patient was
4 in my experience, approximately two to three percent of the
5 develop osteomyelitis under those conditions.

6 Q Well, I appreciate the statistics, but my
7 question was can you tell us how they --

8 A I am sorry.

9 Q How they contract osteomyelitis?

10 A Two ways. One way is if the compounding
11 itself, that is the break in the skin may introduce the infec-
12 ted organism and in spite of the best cleansing of the skin
13 thereafter it may not be thoroughly eradicated and they
14 may develop it from the break in the skin.

15 The other way it may occur in the operating room,
16 the organism may be introduced by the operative procedure
17 itself, that is performed.

18 Q Are those the only two ways that you are aware
19 of that one contracts osteomyelitis?

20 A There are other ways, but --

21 Q I mean, with respect to compound tibia
22 fractures?

23 A Yes.

24 Q So do I understand your testimony to be that one
25 may contract osteomyelitis in the case of a tibia compound

fracture at the time of the initial injury and the osteomyelitis may be enabled to be controlled or prevented to be cured despite the best efforts of the doctors, in a small amount of cases?

A Yes.

Q Is there any way to know whether a particular patient will respond to proper treatment or not, other than to generalize. I assume that most patients do so therefore this patient would. Is there any way to know which ones would respond and which wouldn't?

A Talking about healthy people, no. There is no specific way of knowing considering all reasonable precautions were observed.

Q All right. I'd like now to turn your attention to a different subject. That is this alleged refracture in July of 1973 at the Castle Point Veterans Hospital. I think you will find the appropriate records in the main portion of Plaintiff's Exhibit 5.

My first question to you Doctor, is in your experience do doctors both radiologists and orthopedic surgeons and other doctors, do they sometimes disagree in reading x-rays without a malpractice occurring? Can one doctor look at an x-ray and say there is a --

THE COURT: You are talking about interpretation.

MR. RUDOFISKY: Interpretation, yes. I will rephrase it.

Q Can doctors disagree in interpretation of x-rays without malpractice occurring?

A Yes.

Q Does that happen frequently, very infrequently. Can you tell us how often that happens?

A Well, this is a very broad question. How often does it happen in what situation?

Q Well, how often does it happen that two doctors --

MR. KELNER: Your Honor, if we can save time, we will concede some doctors in some situations will disagree with each other with regard to x-rays or anything else.

THE COURT: the Court will take notice that many doctors interpret x-rays somewhat different than their colleagues.

MR. RUDOFISKY: Without there being a breach of standard care.

THE COURT: Of course. It's a question of reading.

Q In Mr. Lennon's case with respect to this alleged refracture in July of 1973, do the records reveal that

initial x-rays were taken?

340

A July what?

Q July 17, 1972?

Q Would you repeat your question?

Q Does the record reveal that x-rays were taken
on June 17, 1973 --

A July.

Q Excuse me, July, thank you.

A Yes, there is an x-ray report of that date.

Q And can you discern from that report why the
x-rays were taken, statement as to why they were taken?

A It says "pertinent clinical history, osteomyelitis
to rule out fracture of the tibia or fibula."

Q In your opinion was it proper medical care
after Mr. Lennon had, as he has told us, had reported that he
thought he had hurt or refractured or did something to his leg
out of the ordinary; was it proper for them to take these
x-rays?

A Yes.

Q That was the right thing to do, wasn't it?

A Yes.

Q Would you tell us what the -- is that report
signed by anyone, the report that you are looking at?

A Maureen Debbas.

2 Q Is there any indication --

3 A M.D.

4 Q M.D.?

5 A Yes.

6 Q You don't know Dr. Maureen Debbas, do you?

7 A No.

8 Q Is there any indication that Dr. Debbas
9 on that report either found or didn't find the fracture?

10 A The report states that there is no evidence
11 of recent fracture, again no recent fracture.

12 Q Now, how many x-ray examinations are indicated
13 in the hospital records between the date of the alleged
14 refracture, June 17, 1973 --

15 A July.

16 Q July, I am sorry, I apologize, July, and let
17 us say December of 1973?

18 A Well, there is one I find dated July 27, 1973
19 (cont'd on next page)

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1 Q Does that show any recent fracture or any
2 indication there is a fracture on July 17?
3

4 A It's not that specific. The fracture site is
5 noted to be involved in chronic osteomyelitis.

6 Q It doesn't say the new or old fracture?

7 A No.

8 Q Would you go on to the next one?

9 A The next one would be 8/2/73, no radiographic
10 change noted at the site of the previously described tibial
11 fracture. It doesn't say anything to me.

12 Q Could be either the old fracture or new fracture?

13 A Yes.

14 8/22/73, the tibial -- on the lateral aspect of
15 the tibial shaft at the fracture site, again not referring to
16 a new or old fracture.

17 8/17/73, again refers to deposition at the
18 fracture site. No referral to a new or old.

19 9/21/73, examination through plaster, deficit
20 on the tibial side -- I am not sure what they mean.

21 10/25/73, they don't specify referring to the
22 word fracture.

23 10/31/73, again, through a cast. It says
24 something about the predominant pathology, I believe
25 referring to the osteomyelitis at the tibial fracture.

1
2 Then, 12/6/73, the cast has been removed,
3 reveals the previously noted deformity and evidence of chronic
4 osteomyelitis at fracture site at the mid-shaft of the tibia.
5 Deformity or angulation in the healed fracture of the fibula.
6 That is not germane.

7 Q That is it through December?

8 A Yes.

9 Q I believe, and I hope counsel will concede, you
10 read from nine separate reports over a period of six months?

11 A I lost count.

12 Q I believe the record will bear me out.

13 I want you to assume that you have these nine
14 reports. In fact, you do, including a report of July 17th
15 which says no recent fracture, and the following reports
16 which don't distinguish between any old or new fracture;
17 is it possible to say with any degree of medical certainty
18 that Mr. Lennon did or did not fracture his leg on July 17,
19 1973?

20 A Not on the basis of the X-ray reports.

21 Q I want you to turn your attention to a note
22 written by a Dr. Chung on July 31, 1973.

23 A Could you give me the page number?

24 (Pause.)

25 MR. RUDOLFSKY: With your permission, we will go

1
2 beyond this point and apparently we will have to
3 continue over to another day so we will come back to
4 this.

5 This would be a logical point for me to break.
6 From here I am going into the 1972 treatment. If we
7 are going to break at one o'clock I think we should
8 break now. If we are not, I will be happy to go
9 right through.

10 THE COURT: The doctor has a commitment.

11 I may have to put it over because I am having
12 difficulty with two criminal cases. Both are jail
13 cases which makes it difficult.

14 I will have to put this off to the 21st of
15 March and then we will go right through. You will
16 have four days.

17 I am pressured, I have a five-defendant case
18 and a two-defendant case.

19 MR. KELNER: Can we go off the record.

20 (Off-the-record discussion held.)

21 THE COURT: All right, adjourned to March 21,
22 1977.)

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24 * * *
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<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
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EXHIBITS

<u>Plaintiff's Exhibit No.</u>	<u>Description</u>	<u>For Id.</u>	<u>In Ev.</u>
7	X-ray 7/13/72		289
8	X-ray 9/18/72		289
9	X-ray 9/23/74		289

Defendant's
Exhibit No.

A	X-ray 5/18/73		299
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